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FRANCIS JOHN GOOD
ASSOCIATE JUSTICE - SUPERIOR COURT
COMMONWEALTH OF MASSACHUSETTS
1960

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233

CASES ARGUED AND DETERMINED

MASSACHUSETTS IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

APRIL 1919 — OCTOBER 1919

HENRY WALTON SWIFT

REPORTER

BOSTON
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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

HON. WILLIAM CALEB LORING.
(Resigned September 16, 1919.)

HON. HENRY KING BRALEY.

HON. CHARLES AMBROSE DE COURCY.

HON. JOHN CRAWFORD CROSBY.

HON. EDWARD PETER PIERCE.

HON. JAMES BERNARD CARROLL.

HON. CHARLES FRANCIS JENNEY.
(Appointed September 24, 1919.)

ATTORNEYS GENERAL

HON. HENRY CONVERSE ATTWILL.

HON. HENRY AUGUSTUS WYMAN.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

CORRECTION OF ERRORS.

On page 451 of 225 Mass. the words, "for the full amount due upon the mortgage note and interest," at the end of the second headnote should be omitted, and in their place should be inserted "in an action of tort for conversion." No question of law as to the amount of damages to be recovered was raised on the record.

On page 463 of 227 Mass. the verdict in the first action was \$2,800 and that in the second action was \$700.

On page 395 of 230 Mass. in the twelfth line from the bottom, the word "renewed" should have been printed instead of the word "removed."

On page 302 of 231 Mass. in the fifth line, the words "without a jury" should be omitted.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

JAMES A. KEOWN *vs.* JAMES J. HUGHES.

Suffolk. January 14, 1919. — April 17, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Practice, Civil, Indorser of writ, Exceptions. Constitutional Law.

Although under ordinary circumstances objection to the failure of a non-resident plaintiff in an action at law to furnish an indorser of his writ as security for costs under R. L. c. 173, § 39, is taken to have been waived if such objection is not made at the first term of court after the entry of the writ, yet, where the fact, that the plaintiff is not an inhabitant of the Commonwealth, was not disclosed on the pleadings and was not known to the defendant, this rule does not apply.

An order made by a judge of the Superior Court, that the plaintiff in an action at law be ordered "to furnish an indorser for costs within ten days without specifying the amount that the indorser should be responsible for," is a valid order not void for obscurity.

Such an order cannot be declared to be void on the ground that the judge who made it refused to admit evidence offered by the plaintiff, if no evidence thus offered is set forth in the record and no exception was taken to the exclusion of any evidence offered by the plaintiff.

It is no ground for invalidating such an order, that the judge who made it allowed the defendant to introduce in evidence the pleadings in another action to show that the plaintiff was not an inhabitant of the Commonwealth, if no exception was taken to the admission of this evidence and there does not appear to have been any error in admitting it.

The fact that, after the plaintiff's failure to furnish an indorser on his writ, a motion of the defendant to nonsuit the plaintiff was continued by the judge of his own motion without solicitation on the part of the plaintiff, could give the

plaintiff no ground for complaint, even if he had excepted to the action of the judge, which here he did not.

The provisions contained in R. L. c. 173, §§ 39-43, requiring a plaintiff who is not an inhabitant of the Commonwealth to furnish an indorser of his writ as security for costs, is constitutional.

CONTRACT for \$1,000 for professional services as a physician alleged to have been rendered to the defendant's wife from July 17 to July 28, 1913, and from November, 1916, to March 1, 1917, according to an account annexed. Writ dated June 30, 1917.

On July 5, 1918, the defendant filed the following motion:

"Now comes the defendant in the above entitled cause, and says that the plaintiff is a citizen and an inhabitant of the State of California, and that he is not an inhabitant of this Commonwealth, that he has failed to have his process indorsed before entry thereof by a responsible person, who is an inhabitant of this Commonwealth, in accordance with R. L. c. 173, § 39.

"The knowledge of the fact that the plaintiff is an inhabitant and a citizen of the State of California, was not disclosed upon the pleadings, or the papers in this case, and has only recently come to the attention of the defendant in a suit brought by the plaintiff against the defendant in the United States District Court, for the District of Massachusetts, in which he says under oath, that he is a citizen and an inhabitant of the State of California. Wherefore he prays that the plaintiff be nonsuited, and for his costs."

The motion was heard by *Jenney, J.*, who made an order requiring the plaintiff to furnish an indorser for costs within ten days without specifying the amount for which the indorser should be responsible. This order was made on July 12, 1918.

On July 23, 1918, the defendant filed a motion that the plaintiff be nonsuited for failure to furnish an indorser for costs. The parties were heard upon this motion by *Chase, J.*, and the hearing was continued until August 12, 1918. On that day in the absence of the plaintiff, who had received due notice, the judge granted the motion to nonsuit the plaintiff and ordered that the action be dismissed. Within an hour after the order was made the plaintiff made an oral motion to remove the nonsuit. The motion was denied. On August 14, 1918, the plaintiff filed a motion in writing to remove the nonsuit. This motion was denied by *Chase, J.*,

on August 20, 1918. The judge also denied an oral motion of the plaintiff for leave to introduce evidence to be reported to this court. The plaintiff appealed from the various interlocutory orders.

The plaintiff filed a bill of exceptions in which he complained of various matters as described in the opinion. This bill of exceptions was allowed by *Chase, J.*

J. A. Keown, pro se, submitted a brief.

No counsel appeared for the defendant.

LORING, J. On July 5, 1918, the defendant made a motion that the plaintiff in the above entitled cause, not being an inhabitant of the Commonwealth, should be nonsuited because his writ had not been indorsed for costs in compliance with R. L. c. 173, § 39. The motion was made more than a year after the date of the writ. It was alleged in the motion that the fact that the plaintiff was not an inhabitant was a fact not disclosed on the face of the pleadings and that it was a fact which "only recently" had come to the knowledge of the defendant. A hearing was had on this motion on July 9, 1918, at which evidence on the issues involved was introduced. The judge reserved his decision. On July 12 the motion was allowed "in the absence of the plaintiff." To the ruling allowing the motion the plaintiff took an exception. That is the only exception stated in the first bill of exceptions now before us.

It is stated in the second bill of exceptions that the order made on July 12 was that the plaintiff be ordered "to furnish an indorser for costs within ten days without specifying the amount that the indorser should be responsible for." No indorser was furnished within the ten days. Thereafter on July 23, 1918, the defendant made a motion that the plaintiff be nonsuited "for failure to furnish an indorser for costs." It is stated in this bill of exceptions that "after hearing the parties upon their motion it was continued to August 12, 1918. On August 12, Judge Frederic Chase in the absence of the plaintiff, due notice having been given, granted the defendant's motion to nonsuit in the plaintiff's absence and ordered the action dismissed, to which an exception was promptly filed on the same day and the plaintiff made an oral motion to remove the nonsuit within an hour after the same had been granted, which motion was refused." It is stated further in

this bill of exceptions that on August 14, 1918, the plaintiff filed a motion to remove "the nonsuit entered in the above entitled case August 12, on the ruling of Judge Frederic H. Chase in the absence of the plaintiff, who bases his motion upon: 1. The pleadings and papers filed in the case. 2. The affidavit hereto attached, and made a part of this motion. A copy of affidavit is herewith annexed and marked Exhibit A." Neither Exhibit A nor the substance of it is set forth in the bill of exceptions. On August 20, 1918, this motion was denied and an exception was taken. That is the first exception set forth in the second bill of exceptions.

The second exception set forth in this bill of exceptions is stated in these words: "The judge rendered no decision at the time but subsequently denied the motion to remove the nonsuit, and also refused to grant the plaintiff's oral motion to introduce evidence and having the evidence reported to the Supreme Judicial Court is ruled upon the evidence to which the plaintiff then and there duly objected and excepted."

We find no error in the matters covered by the exceptions set forth in these bills of exceptions.

Taking up the arguments made by the plaintiff in the order in which they are made on his brief:

1. It is true that under ordinary circumstances the failure of a non-resident to furnish an indorser for costs is taken to have been waived if the objection is not made at the first term of court. That was decided in *Whiting v. Hollister*, 2 Mass. 101, *Gilbert v. Nantucket Bank*, 5 Mass. 97, and *Carpenter v. Aldrich*, 3 Met. 58, relied upon by the plaintiff. But where the fact that the plaintiff is not an inhabitant is not disclosed on the pleadings and is not known to the defendant this rule does not apply.

2. There is nothing in the plaintiff's contention "that the order for costs without stating the amount is void on the ground of obscurity and the possibility of securing an indorser under the circumstances."

3. The plaintiff's next contention is that the order was void because the judge refused to admit evidence in the court below. What this evidence was is not set forth and no exception was taken to the exclusion of any evidence offered by the plaintiff.

4. The next matter complained of is that the judge at the hear-

ing allowed the defendants to introduce in evidence pleadings in another case to show that the plaintiff was not an inhabitant of this State. No exception was taken to the admission of this evidence. There does not appear to have been any error in admitting it. *Bliss v. Nichols*, 12 Allen, 443. See also note to the case relied on by the plaintiff, namely, *Walcott v. Kimball*, 95 Mass. 460, at page 462.

5. The next matter complained of by the plaintiff is that "Judge Frederic H. Chase continued the hearing on the defendant's motion for a nonsuit from July 30 to August 12, 1918, on the court's own motion without solicitation on the part of the plaintiff, upon the plea that the court was reluctant to dismiss the case under the circumstances." No exception was taken to this action of the court. The action of the court could not have been complained of if an exception had been taken.

6. We find nothing that helps the plaintiff in the cases of *Paine v. Hapgood*, 13 Pick. 152, *Feneley v. Mahoney*, 21 Pick. 212, *Johnson v. Sprague*, 183 Mass. 102, and *Shute v. Bills*, 198 Mass. 544, relied on by him. We have examined all the citations relied upon by the plaintiff with the exception of one which we have not been able to find. There is nothing in them which requires notice.

7. We are of opinion that R. L. c. 173, §§ 39 to 43, requiring a non-resident to furnish an indorser for costs is constitutional.

The plaintiff has taken appeals from the interlocutory orders made in this case. No appeal lies because no judgment has been entered.

The entries must be

Appeals dismissed.
Exceptions overruled.

MEMBERS OF THE SCHOOL COMMITTEE OF CAMBRIDGE vs. MAYOR
AND MEMBERS OF THE CITY COUNCIL OF CAMBRIDGE.

Suffolk. February 24, 1919. — April 17, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

School and School Committee. Tax, Distribution of income tax returned to city from State. Words, "Total local tax."

In St. 1917, c. 209, § 1, providing in substance that, in any city, except Boston, wherein the appropriation for any department is determined by law at a certain percentage of the taxable valuation, such city shall, in addition to the amount so determined, appropriate for such department such proportion of the sum returned to the city by the State from the tax upon incomes as the appropriation so determined by law bears to the "total local tax levy of that city for the current year," the words, "total local tax levy" mean the levy for all purposes, and not the levy for municipal purposes only.

PETITION, filed in the Supreme Judicial Court on November 4, 1918, by the school committee against the mayor and city council of Cambridge for a writ of mandamus directing the respondents to set aside for the school department from the portion of the tax upon incomes returned to Cambridge by the State such proportion thereof as the appropriation already made bore to the total tax levy for municipal purposes, instead of such proportion thereof as the apportionment already made bore to the total tax levy for all purposes.

The petition was heard by *Crosby, J.* The material facts, which were agreed upon, are stated in the opinion.

The petitioners asked the single justice to rule as follows:

"1. The words 'total local tax levy' as used in St. 1917, c. 209, § 1, mean the tax levied by a city for local purposes only as distinguished from taxes levied by a city for State and county and other purposes.

"2. The words 'total local tax levy' as used in St. 1917, c. 209, § 1, mean the total tax levied by a city for municipal purposes only as distinguished from taxes levied by said city for State and county and other purposes.

"3. The intent of the Legislature in enacting St. 1917, c. 209, § 1, was to give to the school committee of a city to which said statute applies the same relative proportion of the tax upon incomes, returned by the Commonwealth to such city under the provisions of St. 1916, c. 269, § 23, as such school committee had previously received from municipal appropriations of such city."

The single justice refused to rule as requested by the petitioners, but, upon request of the respondents, found and ruled as follows:

"1. The words, 'total local tax levy' of a city as used in St. 1917, c. 209, § 1, mean the total tax levied by the local assessors of the city upon the polls and property in said city.

"2. The 'total local tax levy' of the city of Cambridge for the year 1917 was, \$3,150,806.107.

"3. The 'total local tax levy' of the city of Cambridge for the year 1917, was the total amount assessed by the local assessors upon the property and polls in said city for the year 1917.

"4. The words, 'total local tax levy' as used in St. 1917, c. 209, § 1, mean the total tax levied by a city for all purposes for which it is by law required to assess taxes.

"5. The word 'local' as used in the phrase 'total local tax levy' as used in St. 1917, c. 209, § 1, means the place and not the purposes of said levy."

The single justice dismissed the petition; and the petitioners alleged exceptions.

St. 1917, c. 209, § 1, is as follows:

"Any city, except Boston, wherein the appropriation for any department is determined by law at a certain rate or percentage of the taxable valuation or the valuation of the taxable property therein, or however otherwise the same may be described, shall, in addition to the amount so determined, appropriate and use for such department such proportion of the proceeds of the tax upon incomes, returned by the Commonwealth to the city under the provisions of section twenty-three of chapter two hundred and sixty-nine of the General Acts of the year nineteen hundred and sixteen, as the appropriation so determined by law bears to the total local tax levy of that city for the current year."

The case was submitted on briefs.

H. F. R. Dolan, J. H. Morson & J. S. O'Neill, for the petitioners.

P. J. Nelligan & G. H. McDermott, for the respondents.

PIERCE, J. This is a petition for mandamus, brought by the members of the school committee of the city of Cambridge against the mayor and the members of the city council of that city and the city of Cambridge in its corporate capacity. The petitioners pray that the court will determine the amount of the proceeds of the tax upon incomes, returned by the Commonwealth to the city of Cambridge under the provisions of St. 1916, c. 269, § 23, to which the school department of the said city is entitled under the terms of St. 1917, c. 209; and will issue its writ for mandamus in favor of the petitioners, to be directed against the respondents, commanding them to cause to be made an appropriation for the use of the school department from said proceeds in amount equal to the difference between the amount so determined and the sum of \$75,031.27, — the amount heretofore appropriated for the use of said school department under the terms of said St. 1917, c. 209.

It is agreed that the voters of the city of Cambridge adopted and accepted the provisions of St. 1915, c. 267, Part III, known as Plan B, as a charter for the government of said city, that the charter became operative on January 3, 1916, and that continuously since that date and up to the present time has been the charter of said city; that a majority of the voters of said city duly accepted the provisions of St. 1913, c. 804, before the happening of the matters and things in the petition complained of; that the average amount of taxable property of said city during the three years preceding the year 1917 was \$128,382,330; that the sum to be appropriated, and in fact appropriated, under St. 1913, c. 804, for school purposes for the financial year beginning April 1, 1917, was \$770,293.98; that the total tax for all purposes in said city for the year 1917 was \$3,150,806.10; and that of said sum the total tax for municipal purposes only was \$2,480,928.66. It was further agreed that the amount returned to the city by the State under the provisions of St. 1916, c. 269, § 23, was \$306,500.27. The amount \$770,293.98 appropriated for school purposes for the year beginning April 1, 1917, is 24.48 per cent of the total tax levy of \$3,150,806.10; and 24.48 per cent of the amount returned by the State, \$306,500.27, is \$75,031.27, the amount appropriated for the use of the schools by the respondents from the fund. The amount \$770,293.98 appropriated for school purposes for the year beginning April 1, 1917, is 31.048 per cent of the total tax levy for

municipal purposes only, \$2,480,928.66, and 31.048 per cent of the amount returned by the State, \$306,500.27, is \$98,662.44.

The petitioners contend that there should be paid and appropriated for the use of the school committee for school purposes \$98,662.44, and not \$75,031.27, as the respondents contend. They support their contention by the argument that the word "local" in the phrase "total local tax levy of that city" is superfluous, and without force and effect unless it refers to the purpose for which the levy is made; and that it cannot refer to the place of levy because the statute expressly provides that it shall be the levy "of that city." But we are of opinion that the emphatic word is "total," and that it modifies the word "local" as a part only of the entire phrase that follows. So construed, the proportion of the proceeds of the tax on incomes returned by the Commonwealth to the city for the use of any department is determined by the aggregate amount of all taxes levied by the local assessors for general purposes under St. 1909, c. 490, Part I, § 37, and not by the total tax assessed and levied for municipal purposes.

Exceptions overruled.

ROGER ERNST, trustee, *vs.* ROBERT W. RIVERS & others.

Suffolk. March 3, 1919. — April 17, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Devise and Legacy, "Lineal heirs." Power. Rule against Perpetuities. Words, "Lineal heirs."

A mother by her will gave to her son certain property for life with a power, in the event of his dying without issue living, of appointment among the "lineal heirs" of the mother. The will of the son, who died without issue living, provided that a certain portion of the fund should be held in trust for the benefit of a niece of the son during her life, and, in the event of her dying leaving no issue surviving her, that it should be conveyed "to the lineal heirs of" the testator's "mother," and, if there were no such "lineal heirs" then living, then to certain cousins. The testator's mother died in 1859, the testator in 1875, and his niece in 1918, no issue surviving her, at which time there were living nine great-grandchildren of the testator's mother, one a child of one grandchild, and eight of another grandchild, and nine great-great-grandchildren, children of three of these same living great-grandchildren, and no children of any deceased great grandchild. Upon a bill in equity by the trustee for instructions, it was held,

- (1) That the trust provision was not void as a violation of the rule against perpetuities because the life beneficiaries were all living before the death of the donor of the power;
- (2) That the testator intended to use the words "lineal heirs" in the same sense that his mother had used them in her will;
- (3) That in the provision in question, the words "lineal heirs" meant descendants of the mother who were living at the time of the death of the niece in the same degree of relationship;
- (4) That the great-great-grandchildren, all being children of living great-grandchildren, were not entitled to share in the fund;
- (5) That the fund should be divided equally among the nine great-grandchildren of the testator's mother.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 15, 1918, and afterwards amended, by the surviving trustee under the will of Jonathan Russell, late of Milton, for instructions.

Clifford H. Walker, Esquire, was appointed guardian *ad litem* for certain minors, great-great-grandchildren of the mother of the testator.

The suit was reserved by *Crosby, J.*, upon the amended bill and answers for determination by the full court.

H. K. Brown, for the trustee, stated the case.

B. Corneau, (*R. Frothingham* with him,) for the defendant Robert Wheaton Rivers.

W. L. Van Kleeck, (*E. A. Howes, Jr.*, with him,) for Mary G. M. Shields and others.

C. H. Walker, guardian *ad litem*, *pro se*.

CROSBY, J. This is a bill for instructions by the surviving trustee under the will of Jonathan Russell.

The trust fund respecting which the trustee desires instructions has been held heretofore for the benefit of one Mary Rivers, a niece of the testator, who died on August 7, 1918, thereby ending the trust except for the purposes of distribution.

By her will as modified by the first and third codicils, Lydia Smith Russell, mother of Jonathan Russell, disposed of her estate (so far as material to the questions involved in this case) as follows: She devised and bequeathed one fourth of her estate (increased to one third by the death of her daughter Ida before the testatrix's death) to her son Jonathan, to have and to hold for and during his natural life with the power of appointment by will, which in its final form as expressed in the third codicil is as follows: "It is

my will that my daughters and son shall have power of disposing of their respective shares of my estate among my lineal heirs, to have and enjoy the same upon such terms and provisions as may be prescribed by my children. The foregoing provisions are made for appointments to take effect in case of the death of any of my children without issue then living." The testatrix, Lydia Smith Russell, died in 1859 and was survived by three children, namely, Jonathan Russell who died in 1875 without issue, Geraldine I. (Rivers) Upton who died in 1885 leaving three children, and Rosalie G. Russell who died in 1897 without issue.

The children of Geraldine who survived her were George R. R. Rivers who died in 1900 and is survived by one child, Robert Wheaton Rivers; Rosalie G. Sheffield who died in 1909 leaving nine children, one of whom has since deceased without issue; and Mary Rivers who died in 1918 without issue. She was the last of the grandchildren. It thus appears that at the time of the death of Mary Rivers there were living nine great-grandchildren of Lydia Smith Russell, namely, the surviving son of George R. R. Rivers and eight surviving sons and daughters of Rosalie G. Sheffield; and no issue of any deceased great-grandchildren. The son of George R. R. Rivers has three children. One of the sons of Rosalie G. Sheffield has two children; one of her daughters had four children at the date of Mary Rivers' death, one of whom has since died. The descendants of Lydia Smith Russell living at the date of Mary Rivers' death therefore were nine great-grandchildren and nine children of three of these same great-grandchildren.

Under the will of Lydia Smith Russell as modified by the first and third codicil thereto, Jonathan Russell received one third of his mother's estate in trust for his benefit for life with power (in the event of his death without issue then living) to appoint by will the principal among the "lineal heirs" of his mother at his decease.

Under the third article of Jonathan Russell's will as modified by the first codicil, he devised and bequeathed the fund as follows: To his sister Rosalie G. Russell he gave a life estate in certain real estate in Milton; and the rest of his estate to trustees to pay the income in equal shares to his two sisters, Geraldine I. Upton (formerly Rivers) and Rosalie G. Russell during their respective

lives, — Geraldine to receive the entire income if Rosalie should die first. If (as happened) Geraldine should die first, the trust fund should then be divided into two equal parts, one of which the trustees should continue to hold for the benefit of his [the testator's] sister Rosalie during her life; the other half was to be divided into three equal parts, one of which was to go to Geraldine's son George R. R. Rivers absolutely, and the other two thirds were to be held in trust for the benefit of Geraldine's two daughters, Mary Rivers and Rosalie G. Sheffield, equally during their respective lives; it being provided that on the death of each of these two daughters the trustees "shall convey in fee simple and transfer" the principal of the share so held in trust for her benefit to her children then living and the lawful issue of any deceased child of such daughter; and in the event that either daughter should leave no lawful issue surviving at her death, then they (the trustees) shall under the first codicil "convey in fee simple and transfer" such share "to the lineal heirs of my mother, Mrs. Lydia Smith Russell," and if there be no such "lineal heirs" then living to my cousins Mrs. Lucinda Jameson and Mrs. Sarah Ernst, in equal shares; "or if either of them be then dead, to convey in fee simple, transfer and pay over her said share to her lawful issue then living." The provision so made under the first codicil was in substitution for a provision in the original will, which directed the trustees, upon the contingency above referred to, to "convey in fee simple and transfer the same to the persons who shall then be the heirs at law of my said sister Geraldine." The will and codicil provide for the same disposition of Rosalie G. Russell's share after her death, including the real estate in Milton. This real estate has been sold and one third of each half of the principal of the fund and of the proceeds of the real estate has been distributed to George R. R. Rivers.

That part of the remainder which was held in trust for Mrs. Sheffield (Geraldine's daughter) and one third of the proceeds of the real estate in Milton have been distributed to her surviving heirs under the terms of the will. *Leverett v. Rivers*, 208 Mass. 241. As previously stated this bill for instructions relates to the final distribution of the portion of the trust fund held for the benefit of Mary Rivers, Geraldine Upton's unmarried daughter who died on August 7, 1918, without issue. The trustees are directed by the

testator upon the happening of this contingency to "convey in fee simple and transfer" the fund so held in trust for Mary Rivers to the "lineal heirs of my mother, Mrs. Lydia Smith Russell;" and the questions are, what persons are entitled thereto, and in what proportions?

The trust fund so to be distributed consists of one third of the trust estate created by the testator's will, — being one third of the one half which was partially distributed on the death of Geraldine; and one third of the one half which was thereafter held for the use and benefit of Rosalie G. Russell, and was partially distributed after her death; and also, one third of the proceeds of the real estate in Milton.

The trust created by the will of Jonathan Russell is not contrary to the rule against perpetuities, as it appears that the three children of Geraldine I. Upton were all in being before the death of Lydia Smith Russell. *Leverett v. Rivers, supra.*

In exercising the power of appointment given to him by his mother's will, the testator followed closely the language used by her in her will; and it is a reasonable inference that in making his appointment he used the words "lineal heirs" in the same sense in which he believed them to have been used in her will, and intended them to have the same meaning.

It is plain that "lineal heirs" means descendants. While the testator's mother died in 1859, his death did not occur until 1875, and it would seem certain that he did not intend to use the word "heirs" in the strict legal sense of heirs as they existed at the time of his mother's death. At that time they were his two sisters and himself. If he had meant them the use of the word "lineal" would have been unnecessary. When the will is construed as a whole, in view of all the circumstances it could not reasonably be found that he intended to include himself and his two sisters as the only members of a class who should take upon the final distribution of the fund. Having provided an equitable life estate for each of the daughters of Geraldine who should survive her mother, this sister would not have been living when the contingency happened upon which "lineal heirs" would become entitled. Besides, he expressly provided in the first codicil that his trustee should convey to his two cousins if there shall be no such "lineal heirs" then living. In view of these considerations and the other provisions of his will,

it is manifest that he did not intend to make a gift to a class the members of which were to be determined as of the date of his mother's death, but that such heirs should be ascertained on the happening of a future event, at which time the trustees were to transfer and convey the fund.

The general rule of construction that the rights of devisees or legatees are to be taken to vest at the time of the testator's death cannot prevail if contrary to the clearly expressed intention of the testator. *Heard v. Read*, 169 Mass. 216. *Bosworth v. Stockbridge*, 189 Mass. 266. *Crapo v. Price*, 190 Mass. 317. *White v. Underwood*, 215 Mass. 299. The time when the trustees are directed to transfer and convey the fund to the "lineal heirs" of the testator's mother must be held to have referred to the time when Mary Rivers died, without issue. It is a general rule of construction to be followed unless the testator has clearly manifested a contrary intention that a devise or bequest to "heirs" or "issue" refers to that class of beneficiaries who would be entitled to take under the law of intestate succession if the designated ancestor had died at the time fixed for ascertaining the class, and also indicates that the members of the class so determined are to share in the same manner and proportions as such persons would share under the statute relating to the distribution of intestate estates. *Houghton v. Kendall*, 7 Allen, 72. *Rand v. Sanger*, 115 Mass. 124. *Allen v. Boardman*, 193 Mass. 284, 286.

Where a gift is made to members of a class described as "heirs" or "issue" in accordance with the rule last above stated it is held that grandchildren and their descendants will not be allowed to compete with their parents unless such was the intention of the testator. We find no such intention on the part of the testator in the case at bar. In *Manning v. Manning*, 229 Mass. 527, at page 529, it was said: "By allowing the grandchildren and great-grandchildren to take simultaneously it admits children to compete with their living parents, — a construction to be avoided unless such plainly was the testator's intention." *Jackson v. Jackson*, 153 Mass. 374. *Coates v. Burton*, 191 Mass. 180. *Dexter v. Inches*, 147 Mass. 324. It follows that the "lineal heirs" of Lydia Smith Russell at the date of Mary Rivers' death are her nine great-grandchildren; and that their children, although descendants of Mrs. Russell, are not members of the class described in the will

of the testator because, their parents being alive, they would not be entitled to inherit from Mrs. Russell under the statute of distribution. R. L. c. 133, § 1. And as all of the nine members of the class are of the same degree of kindred to Mrs. Russell they are entitled to share equally.

While it is agreed by counsel for the great-great-grandchildren that the "lineal heirs" are those living at the time of the death of Mary Rivers, and that when she died the time for distribution had arrived, he contends that the words "my lineal heirs," as used in the third codicil of Mrs. Russell's will which gave to her son Jonathan the power of disposing of his share of her estate "among my lineal heirs," mean all the descendants of Mrs. Russell however remote, and that those words were so construed by this court in the case of *Leverett v. Rivers, supra*. In that case the question for decision was whether the appointment to children of Mrs. Sheffield born after Jonathan Russell's death was valid. The statement in the opinion that "When a power is given to appoint among the lineal heirs (which in this case as matter of construction means descendants) of the testator . . ." meant that "lineal heirs" were direct descendants as distinguished from collateral heirs. The court did not undertake to define in that case the limits of the class who would be entitled to take on final distribution upon the contingency which has happened in the case at bar.

We cannot agree with the contention of Robert Wheaton Rivers that he is entitled to one half of the estate, and that the other half should be divided between the eight surviving children of Rosalie G. Sheffield. There is nothing to show that the testator intended that the distribution should be *per stirpes*; such a division would not be in accordance with the rule of the statute of distribution, and would be contrary to the rule of construction applied in cases hereinbefore referred to where the word "heirs" and the word "issue" have been used in description of a class.

A decree is to be entered directing the petitioner to transfer and convey one ninth part of the trust fund with accumulations of income since the death of Mary Rivers, to each one of the eight surviving children of Rosalie G. Sheffield, and the remaining one ninth part to Robert Wheaton Rivers, the only surviving child of George R. R. Rivers. Costs and counsel fees are to be allowed to be paid out of the fund to the guardian *ad litem* of the great-great-

grandchildren for his services, the amount to be determined by a single justice.

So ordered.

JULIUS A. KOLTIN vs. GEORGE H. BROWN.

Suffolk. March 7, 1919. — April 17, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Small Loans Act. Bills and Notes, Consideration, Payment. Waiver.

Where one, who was not engaged in the business of making small loans, lent a sum of money less than \$1,000 to a corporation and received therefor a note of the corporation, payable in two months and indorsed by one B and another, which was renewed five times by the giving of a new note with the same indorsements for the balance then due and the payment of interest in advance on each renewal note at the rate of three per cent per month; and where there were five further renewals of respective balances due upon the loan by notes of B only, to which neither the corporation nor the other indorser was a party, payments in advance of interest at three per cent per month being made at each renewal, the giving of the renewal notes from time to time did not constitute new loans under the provision of § 51 of the small loans act, R. L. c. 102; and the payments on account of principal and interest must be treated as payments on account of the original loan and not as independent transactions.

Where, in an action on the last note given as above described, it appeared that, previous to the giving of the note, the sum of all payments on account of principal and of the respective payments of interest in excess of eighteen per cent per annum was sufficient fully to pay the original loan, the provisions of § 51 of the act applied, and it was *held* that, when the note in suit was given, the debt already had been discharged, so that the note was without consideration and judgment must be entered for the defendant.

The circumstance that B was not the maker of the first six notes was not material, since as indorser he was liable thereon, and was liable as maker upon the later notes.

There was nothing in the circumstances above described which would warrant a finding that B had waived his right under the statute by the executing and delivering of the last note, because at the time he did so there was no debt in existence.

It also was *held* to be immaterial that the payments which amounted to a sufficient sum to discharge the original loan had been made by different persons liable for the amount borrowed.

CONTRACT upon a promissory note for \$150. Writ in the Municipal Court of the City of Boston dated January 4, 1918.

The facts which appeared at the trial in the Municipal Court, and also the questions of law there raised, are described in the

opinion. The trial judge found for the defendant and, at the request of the plaintiff, reported the case to the Appellate Division. The Appellate Division ordered judgment to be entered for the plaintiff. The defendant appealed.

Section 51 of R. L. c. 102, known as the small loans act, is as follows:

"A loan of less than one thousand dollars shall be discharged upon payment or tender by the debtor of the principal sum actually borrowed and interest at the rate of eighteen per cent per annum from the time said money was borrowed and a sum not exceeding five dollars for the actual expenses of making and securing the loan; but the lender shall be entitled to interest for six months at said rate if the debt is paid before the expiration of that period. All payments in excess of said rate shall be applied to the discharge of the principal, and the borrower shall be obliged to pay or tender only the balance of the principal and interest, at said rate, due after such application."

W. R. Scarritt, Jr., for the defendant.

H. C. Dunbar, for the plaintiff.

CROSBY, J. This is an action on a promissory note made by the defendant and delivered to one Rubenstein, who transferred it to the plaintiff after maturity. The defence is want of consideration.

The history of the transaction between the parties so far as material to the determination of the issue involved is as follows: On March 1, 1915, a corporation known as the Dinsmore Power Process Company borrowed \$590 from Rubenstein and gave to him its promissory note for that amount payable to his order in two months. The note was indorsed by the defendant and also by one Mintz. This note was renewed five times and a new note was given upon each renewal for the balance then due; the interest on the new note was paid in advance by the maker at the rate of three per cent a month, and the old note was delivered up to the maker for cancellation. On all the notes above referred to the defendant and Mintz were indorsers.

On March 6, 1916, a note was given to Rubenstein for the amount then due. The defendant Brown was the maker of this note, but it was not indorsed by Mintz nor was the Dinsmore Power Process Company a party to it. There were five renewals

of this note so given by the defendant, of which the one in suit is the last. At the time of each of these renewals the old note was delivered up and a new note given for the amount then due. Payments were made from time to time upon the principal of the loan, and at the time of each renewal the interest on the new note was paid in advance. The entire amount of the interest payments upon the twelve notes so given amounted to \$286.80; and the entire amount of the payments on account of principal amounted to \$440. It was agreed before the trial judge that "the sum of that portion of the respective interest payments (except the last payment of \$9 on the note in suit, which it is contended by the plaintiff is within the statutory minimum) in excess of 18 per cent per annum upon the amount and for the period for which each interest payment was made is sufficient if it should be applied to the note in suit to fully pay the same." As it is admitted by the plaintiff that the total payments made upon the loan by all the different parties liable on the notes were in excess of the amount required by R. L. c. 102, § 51, to discharge the loan, it is the contention of the defendant that the loan was fully discharged before the note in question was given and that it was without consideration; and having been acquired by the plaintiff after maturity, the defendant is not liable thereon. It is the contention of the plaintiff that the statute is not applicable to the case at bar.

While the questions presented have not been previously considered by this court, we are of opinion that it was the intention of the Legislature as expressed in the statute to make it applicable to loans of this kind. Under the statute, the giving of the notes from time to time for the amount then due did not constitute in each instance a new loan. The payments on account of principal and interest are to be treated as payments on account of the original loan, and not as separate and independent transactions. All the payments were made on account of the original sum borrowed; and, as the loan was for less than \$1,000, and there has been paid on account thereof a sum exceeding the amount actually borrowed and a sum equal to \$5 for the actual expenses of making and securing the loan, it follows that when the note in suit was given the debt had been discharged; and as the note is without consideration no legal liability is imposed upon the de-

fendant. The circumstance that the defendant was not the maker of the first six notes cannot affect the conclusion reached; as an indorser of these notes he was liable thereon, and as to all subsequent notes except the last he was primarily liable as maker.

It could not properly be found that there was a waiver by the borrower of any rights given by the statute. Undoubtedly the borrower could waive his rights if he saw fit to do so, as the statute was intended for his benefit. *Reed v. Boston Loan Co.* 160 Mass. 237. *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72. In *Spofford v. State Loan Co.* 208 Mass. 84, it was held that where a borrower executed to the lender a release of all his rights under the statute, he was bound thereby. That case is not an authority in favor of the plaintiff. *Shawmut Commercial Paper Co. v. Brigham*, *supra*, does not support the plaintiff's contention. In that case the borrower had not paid or tendered the full amount of the loan, and therefore could not take advantage of the statute. In the present case the note had been paid in full under the statute before the last note was given.

It being admitted that the lender has received payments sufficient to discharge the loan under the statute, it is immaterial that such payments have been made by different persons liable for the amount borrowed.

It follows that the order of the Appellate Division, that judgment be entered for the plaintiff for the amount therein stated with interest, must be reversed and judgment entered for the defendant.

So ordered.

JAMES A. KEOWN vs. JULIA E. TRUDO & others.

Middlesex. March 22, 1919. — April 17, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Practice, Civil, Indorser of writ.

The decision in *Keown v. Hughes*, ante, 1, affirmed.

TORT for alleged alienation of the affections of the plaintiff's wife by the defendants. Writ dated June 30, 1917.

There was a motion for an indorser of the plaintiff's writ as

security for costs, the plaintiff being an inhabitant of the State of California. The plaintiff was ordered to furnish an indorser for costs without specifying the amount for which the indorser should be responsible. The plaintiff having failed to comply with the order within ten days as required by its terms, upon motion of the defendants the plaintiff was nonsuited with costs. The plaintiff alleged exceptions similar to those alleged in the case of *Keown v. Hughes, ante*, 1.

The case was submitted on briefs.

J. A. Keown, pro se.

F. Hunt, for the defendants.

BY THE COURT. All questions raised on this record are disposed of adversely to the contentions of the plaintiff by the decision just rendered in *Keown v. Hughes, ante*, 1.

Appeals dismissed.

Exceptions overruled.

ANDREWS ELECTRIC, INCORPORATED, *vs.* ST. ALPHONSE CATHOLIC
TOTAL ABSTINENCE SOCIETY & others.

Plymouth. March 6, 1919. — April 22, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Order. Assignment. Contract, Consideration. Equity Jurisdiction, To enforce satisfaction by debtor of order of creditor to pay part of debt to a third person.
Equity Pleading and Practice, Decree.

An order by a building contractor directing the owner of a building which he was erecting to pay to a subcontractor a certain sum "out of the amount coming to me on my contract . . . same being the balance due" the subcontractor "on wiring contract," is as between the parties an assignment when delivered to the owner.

Where, more than four months after the delivery to the owner of the order above described and without the order ever having been accepted by the owner, the contractor is adjudicated a bankrupt, the order, if it appears that it was made in good faith, is valid as an assignment and enforceable in a suit in equity by the subcontractor against the owner, the contractor and the contractor's trustee in bankruptcy, although it is an order by a creditor upon his debtor to pay less than the whole of the debt to a third person, which could not be enforced in an action at law.

In such a suit a proper decree is one directing the owner to pay to the subcontractor the amount of the order with interest from the filing of the bill, and to pay the balance of the debt due to the contractor to his trustee in bankruptcy.

BILL IN EQUITY, filed in the Superior Court on April 18, 1918, against St. Alphonse Catholic Total Abstinence Society, the owner of a certain building, James Shields, the contractor who built it for the owner, and Ovide V. Fortier, his trustee in bankruptcy, to compel payment to the plaintiff of a sum due to it as a subcontractor and alleged to have been assigned to it by the contractor more than four months before the bankruptcy of the contractor from funds due to him from the owner.

The suit was heard by *N. P. Brown, J.*, upon the bill, answers and an agreed statement of facts, and, at the request of the parties, was reported by him for determination by this court.

W. G. Rowe, for the plaintiff.

H. F. Parker, for the defendants.

PIERCE, J. The plaintiff in 1915 was employed as a subcontractor on a building erected for the defendant St. Alphonse Catholic Total Abstinence Society. The contractor was the defendant James Shields. The defendant Ovide V. Fortier is the trustee in bankruptcy of the estate of Shields. At the completion of the work of the plaintiff, Shields owed it \$223. It requested Shields to make payment of the debt due, and he thereupon delivered to it the following order upon the society:

"St. Alphonse Total Abstinence Society,
Gentlemen: —

Kindly pay to Andrews Electric Inc., the sum of \$223 out of the amount coming to me on my contract with the society, same being the balance due them on wiring contract.

James Shields."

Before March 9, 1916, the plaintiff delivered this order to one Barlow, an architect employed by the society and the architect on the building in question. On March 9, 1916, the plaintiff wrote to the treasurer of the society a letter wherein it was stated that "he [Shields] has given us an order on his account with you for the balance, thus releasing any claim he may have on so much of the balance due on the building due him as will satisfy our bill, namely, \$223. This order has been handed to Mr. Barlow."

When the order was delivered through Barlow to the society it claimed certain deductions from the balance of the contract price for the work done by Shields, because of defective work,

and it was therefore uncertain what amount if any was due Shields. The order was never in fact accepted. Upon an adjustment of the account in March, 1918, under authority of the bankruptcy court it was agreed that the society owed Shields \$419 when the order was given to the plaintiff.

The order was a good assignment between the parties. *Richardson v. White*, 167 Mass. 58. It was given in consideration of a pre-existing debt, was drawn upon a specific fund identified by the order itself, was delivered to the payee and notice thereof was given to the debtor. *Putnam v. Story*, 132 Mass. 205, 212. *Holbrook v. Payne*, 151 Mass. 383.

Shields was adjudicated a voluntary bankrupt on January 25, 1917. There is nothing in the agreed statement of facts to show that Shields had any other creditor than the plaintiff when the order was given it, and the existence of creditors on March 9, 1916, cannot be inferred from the fact that Shields was bankrupt on January 25, 1917. The assignment appears to have been made in good faith, it did not affect the rights of creditors and was made more than four months before the commencement of bankruptcy proceedings. An assignment of the whole fund made under these circumstances is good between the parties and against the trustee in bankruptcy of the assignor. *Bridge v. Kedon*, 163 Cal. 493. *Stewart v. Platt*, 101 U. S. 731. *Sawyer v. Turpin*, 91 U. S. 114.

An assignment of part of the fund against the consent of the drawee is void at law because the partial assignee is not an attorney with power to sue in the assignor's name and because "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire." *Gibson v. Cooke*, 20 Pick. 15, 18. *Palmer v. Merrill*, 6 Cush. 282. *Papineau v. Naumkeag Steam Cotton Co.* 126 Mass. 372. *Mandeville v. Welch*, 5 Wheat. 277, 286. In equity, however, the objections to a partial assignment disappear. All persons in interest can be brought before the court in a single suit and a decree can be entered which will protect the rights of all parties concerned. *National Exchange Bank v. McLoon*, 73 Maine, 498.

The question at issue has never been directly decided in this Commonwealth, but inferentially the decisions are in accord with the very great weight of authority in England and the United

States in the support of the legal statement that such an assignment is valid in equity without the assent of the debtor, trustee or stakeholder; and we are of opinion that such is the true rule and should be followed in this Commonwealth. *Putnam v. Story*, *supra*. *James v. Newton*, 142 Mass. 366. *Richardson v. White*, *supra*. *Kingsbury v. Burrill*, 151 Mass. 199. *Nashua Savings Bank v. Abbott*, 181 Mass. 531. *Security Bank of New York v. Callahan*, 220 Mass. 84. *Row v. Dawson*, 1 Ves. Sr. 331. *Ex parte Moss*, 14 Q. B. D. 310. *Percival v. Dunn*, 29 Ch. D. 128. *Trist v. Child*, 21 Wall. 441. *Peugh v. Porter*, 112 U. S. 737. *Fourth Street Bank v. Yardley*, 165 U. S. 634. *National Exchange Bank v. McLoon*, *supra*. *Risley v. Phenix Bank of New York*, 83 N. Y. 318. *Appeals of City of Philadelphia*, 86 Penn. St. 179. *Bower v. Hadden Blue Stone Co.* 3 Stew. 171.

The assignment being valid in equity and not void as in fraud of creditors or as contravening the bankruptcy act, the trustee took subject to it. *Bridge v. Kedon*, *supra*. *Fletcher v. Morey*, 2 Story, 555. *Parker v. Muggridge*, 2 Story, 334. *In re Hanna*, 105 Fed. Rep. 587.

It follows that a decree should be entered that the St. Alphonse Catholic Total Abstinence Society pay the plaintiff from said fund of \$419 the sum of \$223, with interest thereon from the filing of the bill, and the balance of the fund to the trustee in bankruptcy.

Decree accordingly.

WILLIAM A. GASTON & others vs. BOSTON PENNY
SAVINGS BANK.

Suffolk. March 7, 1919. — April 22, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Pledge. Contract, Construction. Bills and Notes. Interest. Words, "Maturity."

A borrower from a bank gave it his promissory note payable in twelve months for the amount borrowed with a pledge of securities, the note providing that interest thereon should be paid semiannually in advance and that, in case the borrower made a general assignment for the benefit of his creditors, "this note" should "become due and payable immediately, anything herein to the contrary notwithstanding," the borrower promising "to pay the same immediately," in

default of which the securities might be sold, the net proceeds of the sale "to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity." The interest was paid for the first six months in advance. During the first six months' period of the note the borrower made an assignment for the benefit of his creditors, and the bank sold the securities and retained from the net proceeds of the sale enough to cover the principal of the note and interest for the second six months' period. In an action by the assignees in bankruptcy of the borrower against the bank, it was *held*, that the plaintiffs were entitled to recover such a proportion of the interest, paid in advance for the first six months' period, as corresponded to the portion of the first six months not yet expired at the date of the sale of the securities, and the whole of the interest for the second six months' period, the word "maturity" in the agreement referring to the time when, by reason of the assignment, the principal and interest became due and payable.

CONTRACT by the assignees for the benefit of creditors of Eugene N. Foss for \$609.56 alleged wrongfully to have been withheld by the defendant from the sale of securities pledged to it to secure a note, hereinafter described. The third count of the declaration was for "money received by the defendant to the plaintiffs' use." Writ in the Municipal Court of the City of Boston dated March 21, 1918.

The note in question was as follows:

"BOSTON, MASS., July 6th, 1917

\$25000.00

For value received, I, E. N. Foss, promise to pay the Boston Penny Savings Bank, or order, at any Bank in Boston, Twenty-five thousand Dollars, in twelve (12) months from date, with interest at the rate of $5\frac{3}{4}$ per centum per annum, payable semi-annually in advance, and as collateral security for the payment of this or any other direct or indirect liability or liabilities of ours to the holder hereof, due or to become due or that may hereafter be contracted, we have deposited with, and hereby pledge to said Institution the following property, viz.: 100 shrs. Boston Elv. Ry. Co.: 100 shrs. Erie Common: 400 shrs. Long Island R. R. Co.: 1080 shrs. East Boston Co.

And we hereby agree that whenever the market value of said securities, or of any securities that may at any time be held as collateral, according to the public quotations or in the opinion of the President or Treasurer of said Institution shall fall below the sum of Thirty thousand dollars, we will immediately deposit with, and pledge to said Institution additional securities or substitute

other securities for those herein named, or for any securities that have been previously substituted for those herein named, sufficient to make the whole equal, in market value, according to the public quotations and in the opinion of said President or Treasurer, to that sum, and satisfactory to the President or Treasurer or anyone acting on behalf of said Institution, such securities to be held upon the same terms as those above described. In case we fail so to do or a petition in bankruptcy be filed by or against us, or we make a general assignment for the benefit of our creditors, or we sell out our business, or any one of our partners withdraws from our firm, or our authority to pledge any of the securities held as collateral be denied, this note shall become due and payable immediately, anything herein to the contrary notwithstanding, and we hereby promise to pay the same immediately, and in case of the nonperformance of this promise or on the nonpayment of any of the liabilities aforesaid, we hereby authorize and empower the said President or Treasurer or anyone acting on behalf of said Institution to sell any or all of the securities then held, on that day or on any later day, at his option, either by public or private sale, or at any Broker's Board, without advertisement or giving notice to the undersigned or any other person; it being mutually agreed that the President or Treasurer of said Institution, or anyone acting on its behalf, or said Institution, may purchase at said sale; that the proceeds of said sale after deducting all costs and expenses are to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity; and that the balance of money or any securities which then remain unsold (if any) shall be returned to us or our legal representatives. And it is hereby agreed that any notice sent by mail to our place of business or residence shall be deemed to have been received by us in the usual course of mail and that all authority and power given above is also hereby given to any holder or holders of this note, and may be exercised by them or by anyone acting on their behalf as well as by the said President or Treasurer or anyone acting on behalf of said Institution and shall apply to any securities that may be substituted for or added to those above described. And it is further agreed that the said President or Treasurer or anyone acting on behalf of said Institution may at any time before the maturity of this note demand the payment of the whole or any portion of

said money, provided the same, in the judgment of the said President or Treasurer or anyone acting on behalf of said Institution, is wanted to pay depositors, and we hereby agree to promptly make such payment should such demand be made.

[Signed] E. N. Foss."

The case was heard upon an agreed statement of facts substantially as follows:

On July 6, 1917, Eugene N. Foss borrowed \$25,000 from the defendant, giving to it the above note and the securities therein described. The interest for the first six months was discounted in advance by Mr. Foss at the time the loan was made, and an indorsement to that effect then was made on the back of the note. On November 9, 1917, Mr. Foss made a general assignment to the plaintiffs for the benefit of his creditors. Shortly thereafter, in the exercise of the power given by the note, the defendant sold the securities pledged as collateral, realizing from the sale the sum of \$25,471.40. No question was raised as to the right of the defendant to sell the securities pledged as collateral. The defendant applied the proceeds of the sale to the payment of the interest for the second six months' period and to the payment of the principal of the note, the defendant contending as a matter of law that its application of the proceeds from the sale of the collateral in this manner was provided for in the special form of note. The sum received from the sale was insufficient to pay both the principal and the interest for the second six months.

The plaintiffs, as assignees, claimed \$471.40, being that part of the proceeds of the sale of the pledged securities retained by the defendant on account of the interest for the second six months, and also \$138.16, being the proportional part of the interest for the first six months' period discounted in advance, namely, for the period from the date of sale of the securities to the expiration of the first six months' period of the note.

In the Municipal Court the judge found for the plaintiffs in the sum of \$615.95 and, at the request of the defendant, reported the case to the Appellate Division, who ordered the report dismissed. The defendant appealed.

J. L. Dyer, for the defendant.

D. F. Carpenter, for the plaintiffs.

PIERCE, J. The case is before this court on appeal from a final order "Report dismissed" of the Appellate Division of the Municipal Court of the City of Boston. The case was submitted on an agreed statement of facts. The defendant asked the presiding judge to rule as a matter of law that the defendant was entitled on the facts to a finding in its favor. This the judge declined to do and found for the plaintiffs on the first and second counts in the sum of \$615.95, and reported the case to the Appellate Division.

The agreed facts disclose that Mr. Foss borrowed \$25,000 from the defendant, secured by a pledge of certain securities. The note was dated July 6, 1917, and was payable in twelve months from date "with interest at the rate of 5¾ per centum per annum, payable semi-annually in advance." In conformity with the terms of the note the interest for the first six months was paid in advance. The note provided that the due and demandable time of payment fixed therein should be accelerated upon the happening of certain specified events. So far as is material to the issue now presented that provision reads: "In case . . . we make a general assignment for the benefit of our creditors . . . this note shall become due and payable immediately, anything herein to the contrary notwithstanding, and we hereby promise to pay the same immediately, and in case of the non-performance of this promise . . . we hereby authorize and empower . . . [the defendant] . . . to sell any or all of the securities then held . . . it being mutually agreed . . . that the proceeds of said sale after deducting all costs and expenses are to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity; . . ." Mr. Foss made a general assignment to the plaintiffs for the benefit of creditors on November 7, 1917. Shortly thereafter, in the exercise of the power given by the note, the bank sold the securities pledged and realized therefrom a sum insufficient to pay the principal and the interest for the second six months. The bank applied the proceeds to the payment of the principal debt, and to the payment of the interest so far as the money received went.

It contends that the obligation of Mr. Foss on making the assignment was not to pay the principal debt immediately, but was to pay that debt and a definite amount of interest which did not accrue from day to day but was "reserved by contract for the use

of the particular fund for a twelve months' period and represented a present debt — an established liability." In a word, that a fair construction of the contract is that the maker of the note agrees to pay for the loan of the money at once, a sum of money equal to six months' interest on the principal; and on a general assignment for the benefit of creditors the principal sum and a further sum of money equal to six months' interest on the principal debt. The defendant further contends that this is not a case where the payee has exercised an option to call the principal debt and by that act has made the debt due and payable immediately, because, he argues, by the terms of the instrument itself "this note," not the principal, becomes due and payable immediately on the happening of the event, and that the additional words "'with interest thereon to maturity,' import an additional payment to be made by the maker, and unless these words are held to carry interest on the liability to the maturity date of the primary contract, they are given no meaning at all and may as well have been omitted from the instrument."

We are of opinion the provisions of the note as to the payment of interest are to be taken in their common signification, and import that the payee is entitled to as much interest at the rate mentioned as shall accrue until the note is paid. And we are also of opinion that the words "with interest thereon to maturity," as used in the provision "that the proceeds of said sale after deducting all costs and expenses are to be applied to the payment of any or all the liabilities aforesaid, with interest thereon to maturity," have reference to the accrual of interest after the liabilities, that is, principal and interest, in the note have been determined by the happening of any one of the contingencies specified in the note.

We do not assent to the contention of the defendant that a secondary contract to pay the principal sum and an "amount of interest reserved by contract for the use of the particular fund" came into existence upon the assignment by reason of the expression "this note" shall become due, instead of the more common phrase "all sums due."

We are of opinion that the principal debt with accrued interest thereon became payable and demandable when the assignment was made on November 9, 1917. We are of the further opinion that when the debt was paid, the incidental obligation to pay

interest thereon came to an end in the absence of any express agreement to continue to pay it thereafter.

The plaintiffs, under the third count of their declaration, are entitled to recover the excess of interest paid in advance for the use of the money, and also that part of the money retained from the proceeds of the sale of the securities on account of the interest accruing on the note from January 6, 1918, to July 6, 1918.

Order dismissing report affirmed.

ALBERT J. LEVY vs. IRVING C. RADKAY.

Suffolk. March 10, 1919. — April 23, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Sale, Delivery and acceptance, By sample.

Goods, purchased by sample, were ordered by the buyer to be shipped to his address by a certain expressman, the express charges to be paid by the buyer. While the goods were in the possession of the expressman, they were destroyed by fire. In an action by the seller against the buyer for the purchase price, it was *held*, that the title to the goods passed to the buyer upon delivery to the expressman.

It further was *held* that, under the circumstances above described, the rule that, where goods are sold by sample and are selected and shipped by the seller, the buyer has a right of inspection and verification before acceptance, so that, until such right of inspection is exercised or waived, there can be no acceptance, was not applicable, because the title to the goods passed when they were delivered to the carrier chosen by the buyer.

CONTRACT upon an account annexed for \$83.81, the purchase price of goods alleged to have been sold and delivered by the plaintiff to the defendant. Writ in the Municipal Court of the City of Boston dated December 14, 1917.

The findings of fact warranted by the evidence are stated in the opinion. The trial judge found that the defendant directed the plaintiff to ship the merchandise in suit by Mahoney's Express, and that the defendant was to pay the express charges for transportation; and ruled that as a matter of law the title to the merchandise passed to the defendant upon delivery to Mahoney's Express.

The defendant also asked for the following rulings. The disposition made of each ruling is stated after it.

"1. Upon the whole evidence the plaintiff cannot recover." "Not given."

"2. The contract of sale called for delivery of the goods at the defendant's place of business." "Not given — predicated on a fact not found."

"3. To establish the defendant's liability, the plaintiff must deliver the goods at the defendant's place of business, as designated in the order." "Not given — predicated on a fact not found."

"4. The plaintiff was responsible for the goods while in transit and until delivery at the defendant's store." "Not given — not applicable to fact found."

"5. Possession had not changed from the plaintiff to the defendant." "Not given — contrary to fact found."

"6. The goods were sold by sample and selected and shipped by the seller, and the buyer had the right of inspection and verification before acceptance. There was no acceptance until he had exercised this right or waived it." "Not given — not applicable to facts found."

The judge found for the plaintiff, and, at the request of the defendant, reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

J. E. Kelley, for the defendant.

P. Rubenstein, for the plaintiff.

PIERCE, J. This is an action of contract brought by the seller to recover from the buyer the price of goods ordered from samples shown at the buyer's store.

The evidence warranted the finding of the presiding judge, "that the defendant directed the plaintiff to ship the merchandise in suit by Mahoney's Express, and that the defendant was to pay the express charges for transportation." The judge was not bound to believe the testimony of the defendant that the goods were to be delivered to the defendant at his store in Hyde Park. Nor was he required to rule that the order sent by the salesman, "Send to I. Radkay, Hyde Park Ave. . . .", constituted a special or implied contract that the title to the goods should not pass until delivery to the buyer at Hyde Park. St. 1908, c. 237, § 19, Rule 5,

§ 43. The evidence warranted a finding that the plaintiff selected and packed the goods as ordered, and delivered them for transmission to the defendant to Mahoney's Express, the carrier or bailee named by the defendant for that purpose. St. 1908, c. 237, § 19, Rule 4 (2). The goods were destroyed by fire while in the possession of Mahoney's Express.

The request to rule that "Upon the whole evidence the plaintiff cannot recover," could not have been given rightly. The judge by his refusal to rule as requested must be taken to have found that there was no agreement that the title should not pass until delivery at the place of business of the defendant, and to have ruled as he did rule "that the title to the merchandise passed to the defendant upon delivery to Mahoney." *Twitchell-Champlin Co. v. Radonsky*, 207 Mass. 72. *P. Garvan, Inc. v. New York Central & Hudson River Railroad*, 210 Mass. 275.

The finding of fact necessarily made by the judge in refusing the first request, also necessitated a refusal to give rulings numbered 2, 3, 4 and 5.

The sixth request, "The goods were sold by sample and selected and shipped by the seller, and the buyer had the right of inspection and verification before acceptance. There was no acceptance until he had exercised this right or waived it," is sound as a general statement of the law governing sales by sample, but is inapplicable, and could not have been given when the goods were lost by fire or otherwise, and, as here, in pursuance of the terms of the contract they were to be and were in fact delivered to a carrier chosen by the purchaser. Williston on Sales, § 473, and cases cited. After the passing of title the risk of loss and other incidents of ownership fall upon the buyer. *Murphy v. Sagola Lumber Co.* 125 Wis. 363, 368. *McNeal v. Braun*, 24 Vroom, 617, 620, *et seq.* *Skinner v. Griffiths & Sons*, 80 Wash. 291, 293.

The order of the Appellate Division, "Report dismissed," must be affirmed.

So ordered.

THOMAS M. REYNOLDS vs. MISSOURI, KANSAS AND TEXAS
RAILWAY COMPANY & trustee.

Suffolk. January 16, 1919. — May 19, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Trustee Process. Contract, Construction.

A contract in writing between a railroad corporation and an express company provided for a payment by the express company to the railroad company for business done for it on the basis of a certain percentage of the gross revenue received, payments to be made monthly with an annual adjustment. An article of the contract provided that the agreement was "subject to all existing and future Federal and State laws." A trustee process, in an action in which the railroad company was defendant, was served upon the express company in 1915 at a time when it was accountable to the railroad company for monthly payments under the contract for the preceding four months. It appeared that in the years 1909 to 1911, the express company had made payments to the railroad company on the basis of rates which were called in question by the State of Oklahoma under a State statute and later were adjudged in that State to have been in violation of the statute as being too large, and a refunding therefore was ordered in Oklahoma. *Held*, that in the determination of the amount for which the trustee should be charged, it was entitled to be credited with the amount due to it from the defendant under the ruling of the State court of Oklahoma.

BILL IN EQUITY, filed in the Superior Court on August 31, 1915, and afterwards amended into an action at law as stated in the opinion.

In accordance with the decision reported in 228 Mass. 584, judgment was entered against the defendant. Proceedings against the trustee, the American Express Company, are described in the opinion. That trustee admitted that it should be charged in the sum of \$10,997.55.

Article X of the agreement between the railroad company and the American Express Company, mentioned in the opinion, was as follows:

"The Express Company, for and in consideration of the accommodations, services, rights and privileges herein specified, hereby agrees to pay to the Railway Company fifty-five per cent

(55%)* of the gross revenue derived by the Express Company on all business transacted by it upon the lines embraced in this agreement, and the Express Company guarantees that the amount so paid to the Railway Company will, during each year of the term of this agreement, which is understood, so far as guarantee is concerned to begin with February 1st, 1913, at least equal the sum of three hundred seventy-two thousand dollars (\$372,000.00) and a proportionate sum for the fraction of any year should any such fraction of year obtain during the continuance of this agreement.

"The payments hereinbefore provided for shall be made as follows:

"The Express Company shall pay monthly, on or before the tenth day of each month, to the Treasurer of the Railway Company, as advance compensation for the accommodations, services, rights and privileges provided hereunder during the preceding month, the sum of thirty-one thousand dollars (\$31,000.00).

"The Express Company will render as soon as reasonably practicable, but not later than one hundred and twenty (120) days after the end of each month, a certified statement showing the gross revenue derived by it upon business transacted by it during such month, upon the lines embraced in this agreement, and if fifty-five per cent (55%) of the gross revenue shown by said statement shall exceed the sum already paid to the Railway Company as an advance payment for the said month, the Express Company will forthwith pay to the treasurer of the Railway Company the amount of such excess. If, when all the said monthly statements for the twelve months' period ending January 31st, 1914, shall have been rendered by the Express Company to the Railway Company, it shall appear that the sums paid by the Express Company to the Railway Company for such twelve months' period exceed fifty-five per cent (55%) of the gross revenue derived by the Express Company as aforesaid, then the Railway Company will repay to the Express Company the amount of such excess, unless such repayment would reduce the total amount paid hereunder to the Railway Company by the

* For the year 1915, fifty-two and one half per cent was substituted for fifty-five in all places in this article.

Express Company for the said twelve months' period below the guaranteed sum of three hundred seventy-two thousand dollars (\$372,000.00), and in such event the Railway Company will repay to the Express Company only the amount received by the Railway Company hereunder for such twelve months' period in excess of the said sum of three hundred seventy-two thousand dollars (\$372,000.00). A similar adjustment shall be made between the parties hereto, as soon as all the monthly statements shall have been rendered by the Express Company to the Railway Company for each succeeding twelve months' period during the term of this agreement; and also as soon after the termination of this agreement as the Express Company shall have rendered to the Railway Company monthly statements for the period elapsing since the end of the twelve months' period for which the last adjustment was made, a final adjustment between the parties hereto shall similarly be had.

"In the compilation of such monthly statements, the gross revenue from express matter carried by the Express Company only upon the lines of railroad covered by this agreement shall be deemed to be the whole amount received by the Express Company from such matter, but shall not include charges due or paid to other companies or persons, or for express or transportation service on other lines not covered by this agreement; and, further, that in all cases where express matter shall have been carried by the Express Company partly upon the lines of railroad covered by this agreement and partly upon other lines, the gross revenue to be accounted for by the Express Company, as provided for herein, shall be divided between the lines covered by this agreement and other railroad or transportation lines over which the Express Company operates, on a rate prorate of the merchandise rates of the Express Company between the points of origin or destination on lines of railroad over which the Express Company operates, other than those covered by this agreement, and similar rates from or to said junction points to destination or originating points on the lines covered by this agreement." [Here followed an illustrative example.]

Article XIV of that agreement, also mentioned in the opinion, was as follows:

"This agreement is subject to all existing and future Federal

and State laws and to all rules and orders by any board, commission or body having competent authority to regulate either of the parties hereto, or the traffic covered by this contract. In case it shall be found to conflict with any such law, rule or order, valid as against it, it shall be modified to conform thereto. In case of the substantial impairment of the benefits to either party herein contemplated, to such an extent that a readjustment of terms shall not be mutually satisfactory, either party shall have the right to terminate this contract upon a reasonable notice of not less than ninety (90) days to the other."

On motion of the plaintiff, *Chase, J.*, ordered the trustee charged in the sum of \$50,754.09. The trustee appealed.

A. M. Pinkham, for the American Express Company, trustee.

W. E. Tucker, (*H. Clark* with him,) for the plaintiff.

BRALEY, J. The plaintiff originally brought a bill in equity in a writ of summons and attachment by trustee process as provided in R. L. c. 159, § 8, service of which as well as of a subpoena subsequently issued was made upon the trustee directing it to appear and answer the bill "and to show cause why an injunction should not issue." But, an interlocutory decree having been entered dismissing the bill in so far as the trustee was a defendant, the plaintiff under R. L. c. 159, § 6, was allowed to amend the suit into an action at law with leave to file a declaration. The pleadings having been completed, a trial followed in which the plaintiff recovered judgment against the railway company, hereafter called the company, and the only question remaining is the amount for which the trustee should be charged. *Reynolds v. Missouri, Kansas & Texas Railway*, 228 Mass. 584.

The date of service on the trustee was August 31, 1915, and in the amended answer, filed and allowed in substitution of the original answer, the trustee admits that it is chargeable for a balance due the defendant of \$10,997.55; but, the trial court having fixed the amount at \$50,754.09, the case is before us on the trustee's appeal.

The trustee on the record undoubtedly was a debtor of the company on August 31, 1915, and its indebtedness then due and payable is to be ascertained as of that date. *Koontz v. Baltimore & Ohio Railroad*, 220 Mass. 285. R. L. c. 189, § 12. By § 25 it is given the right to deduct all demands against the company

which, if it had not been summoned as trustee, would have been available by way of set-off in an action by the company. The scope and effect of this section enables the trustee to retain or set off in any lawful mode of adjustment between himself and his principal without regard to technical forms any or all moneys or demands except claims for unliquidated damages for wrongs or injuries. "It is the balance only, after all just and equitable allowances, for which he is to be charged." The plaintiff's rights are no greater than those of the original creditor, and if the company could not have recovered more than the amount admitted, the trustee is not chargeable for anything more. *Nutter v. Framingham & Lowell Railroad*, 132 Mass. 427, and cases cited. *Hopedale Manuf. Co. v. Clinton Cotton Mills*, 224 Mass. 193, 197.

The statements in the answer, as well as the answers to the interrogatories being under oath, are to be considered as true, and whatever indebtedness the trustee had incurred arose from its contracts with the company which in all essential particulars were similar to the copy of the contract annexed to the interrogatories. The agreement provides in substance for payment to the company for transacting the business of the trustee of a percentage based on the gross revenue received, and at the time of service it was accountable to the company for the months of May to and including August, 1915. The excess revenue during this period with the guaranty for the month of August amounted to \$62,112.84, and if \$11,358.75, coming to the trustee for "bag-gagemen-messenger service," and incidental expenses concerning which there is no dispute, is deducted, the sum of \$50,754.09 remains for which the plaintiff contends the trustee should be charged.

But the trustee claims that a further deduction of \$39,756.54 should be allowed for over-payments on account of business transacted during the years 1909-1914. *Richards v. Stephenson*, 99 Mass. 311. While these payments had been made, the amount actually due depended upon the outcome of litigation involving its express charges or rates then pending in the State of Oklahoma, which had not been determined at the date of service, or of filing the original answer. The proceedings however having terminated, the amended answer recites in detail the various phases of the litigation which resulted in the trustee being compelled to refund

certain charges levied and collected in excess of the rates established by the local law. Of this sum, \$77,565.20 had been collected for business done over the lines of the company, and the over-payment under the old rates amounted to \$39,756.54. And as shown by the answers to interrogatories fifty and fifty-one that amount was accepted by the company "without protest or reserve" as the basis of the final settlement. If the trustee is entitled to this credit it is chargeable only for \$10,997.55.

The plaintiff's principal contentions, although variously phrased, are, that the contract absolutely required the trustee to make the payments now claimed to have been in excess, or, if there were over-payments, yet, the payments having been voluntarily made, the trustee, if it had sued the company, could not have recovered, and the alleged right of set-off cannot be maintained.

It is true that by the contract the percentage of "fifty-five" per cent, subsequently reduced to fifty-two and one half per cent, rests on the gross revenue received by the trustee on all business it transacts upon the lines embraced in the agreement. But the answer, which is not materially modified by the answers to the interrogatories, states, that these payments were made during the pendency of the litigation on the basis of the rates it had fixed for the transaction of business in Oklahoma, and before it had been required under the order of the corporation commission, and the judgment thereon, to refund the excess charges. It was not contemplated that either the trustee or the company should derive a profit from violations of law. By article XIV the "agreement is subject to all existing and future Federal and State laws, and to all rules and orders by any board, commission or body having competent authority to regulate either of the parties hereto, or the traffic covered by this contract." And the company as well as the trustee was bound by the change in rates in any future accounting. It is plain that during the period in question the "gross revenue" called for by the contract is not the amount received on the old rates, but the amount stipulated in accordance with the rates ordered by the commission.

The contract also expressly provides in article X, that if the sum paid by the trustee shall exceed "fifty-five per cent" of the gross monthly revenue, then the company will repay the amount of such excess, unless such payment would reduce the total amount

for the period of twelve months below "the guaranteed sum of three hundred seventy-two thousand dollars," and in such event payment is limited to any excess above that amount. The trustee doubtless acted with full knowledge of the fact that if it was defeated in the litigation over rates the payments exceeded its liability. But the wording of article X, especially when read with article XIV, does away with any implication that the trustee intended to waive its rights to an adjustment at the end of the yearly period, when the monthly statements and payments for that year were to be reviewed, revised and restated. The trustee manifestly did not intend, nor was it required to relinquish, its right to a full accounting at the close of the year, when all errors, which would include monthly over-payments, were to be corrected, and the balance due from either party to the other was to be ascertained and adjusted.

The amended answer having stated that, "At the time of the service of the plaintiff's writ the express company had paid the railway company all amounts due for the months previous to May 1915, and its proportional part of the guaranteed amount for all months previous to August 1915, but had paid no part of the guaranteed amount for the month of August 1915," the plaintiff's further contention, that the trustee has failed to show that it is entitled to any adjustment because no payment had been made in excess of the amount guaranteed, need not be further considered. The trustee, if at the date of the attachment it had been sued by the company in our courts, accordingly could have maintained its set-off. *Sheldon v. Kendall*, 7 Cush. 217. *Commonwealth v. Phoenix Bank*, 11 Met. 129, 136. *Green v. Nelson*, 12 Met. 567, 573. *Lawrence v. Carter*, 16 Pick. 12, 16. R. L. c. 174, § 1.

It follows that none of the plaintiff's contentions in support of the larger amount can be sustained, and the trustee should be charged in the sum of \$10,997.55.

So ordered.

ANNA G. WHITE vs. J. LOUIS WHITE.

Franklin. January 6, 1919. — May 20, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Marriage and Divorce. Equity Jurisdiction. To enforce decree of another State in separate maintenance proceedings, Contempt. *Equity Pleading and Practice.* Contempt proceedings, Decree. *Constitutional Law.* Full faith and credit to judgment of court of sister State.

So far as relates to enforcement in the courts of this State, a decree of a court of a sister State for separate maintenance or for alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt or a decree of a court of equity for the payment of money, and it is immaterial whether the original decree was based on an action of contract or on a petition for separate maintenance in divorce or probate proceedings.

While such a decree of a court of chancery of New Jersey will be enforced as a foreign judgment here, the plaintiff cannot insist that the same method of enforcement be used here as the one provided in the decree in New Jersey for enforcement there.

A decree for the plaintiff in a suit in equity in our Superior Court to enforce a decree of a New Jersey court of chancery ordering a husband to pay a certain sum of money to his wife, the plaintiff, for her separate maintenance, may be enforced by proceedings in contempt, although the decree of the Superior Court merely directs that a certain sum of money be paid to the plaintiff by the defendant and that execution issue therefor.

BILL IN EQUITY, filed in the Superior Court on July 23, 1918, to enforce a decree of a New Jersey court in chancery in separate maintenance proceedings.

The decree of the New Jersey court was as follows:

"This cause coming on to be heard in the presence of Howe & Davis, Solicitors for and of counsel with the complainant, and in the presence of Ralph E. Lum, Esquire, Solicitor for and of counsel with the defendant, Whereupon, and upon reading the bill of complaint, proofs and report of Hugh B. Reed, Esquire, one of the Special Masters of this Court to whom by a previous order made in this cause it was referred to take depositions and other evidence, and to report, together with his opinion thereon, on the matter of alimony herein; from which and from the other proof produced it now appears to the satisfaction of the Chancellor that the com-

plainant, Anna G. White, and the defendant J. Louis White, were lawfully married on or about October 25, 1899; and that the defendant, without any justifiable cause, abandons the complainant and separates himself from her and refuses, and neglects to maintain and provide for her; and that the defendant was personally served with process in this State;

"It is thereupon, on this Sixteenth day of February, 1918, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, adjudged and decreed that the defendant, J. Louis White, do pay to the complainant, Anna G. White, or to her Solicitors, the sum of Ten dollars per week from and after the date of the filing of the bill of complaint in this cause for and towards the support and maintenance of the complainant and her infant child, J. Louis White, Jr., who is now in the custody of the complainant, and that the sums heretofore paid by the defendant for and towards the support of the complainant and her said infant child, J. Louis White, Jr., under order of the court heretofore made on July 17, 1917, shall be credited upon the payments directed to be made under this order.

"And it is further ordered, adjudged and decreed, that a copy of this decree be served forthwith upon the defendant, or his solicitor, and that within ten days after said service, the defendant do give bond to the said complainant in the sum of One thousand dollars, with sufficient surety or sureties, to be approved as to form and security by William A. Lord, Esquire, one of the Special Masters of this Court, for the punctual payments of the alimony and maintenance by this decree awarded to be paid, at the time and in the manner in this decree directed, and upon neglect or refusal of said defendant to give said bond, within the time so specified, or upon his default or that of his surety or sureties to pay the said sum or sums when the same shall fall due according to this decree, that the complainant be at liberty to apply to this Court to award and issue process of sequestration, or for such other process or order, as this Court may, under the circumstances, deem equitable and just, and as may be consistent with the power and authority of this Court.

"And it is further ordered, adjudged and decreed, that the said defendant do further pay to the complainant, or her solicitors, the costs of this suit to be taxed, and also the sum of One hundred

dollars, which is hereby adjudged and decreed to be a reasonable counsel fee for the counsel of said complainant (in addition to the counsel fee allowed by said order of July 17, 1917, amounting to \$100) and that the said complainant do have execution for said costs and counsel fee according to the practice of this Court."

In the Superior Court a decree was entered directing the defendant to pay to the plaintiff \$1,435.09 and \$17.89 costs, and that execution issue therefor. The execution not being paid, the plaintiff, after it was served upon the defendant, moved that the defendant be adjudged in contempt.

The motion was heard by *Aiken*, C. J., who ruled "that the Superior Court had no jurisdiction to punish the defendant for contempt in failing to pay money according to a decree of that court, when that decree is based upon a decree of a New Jersey court in separate support or divorce proceedings in New Jersey," and reported the case for determination by this court.

The case was submitted on briefs.

W. A. Davenport & C. Fairhurst, for the plaintiff.

F. J. Lawler & R. H. P. Jacobus, for the defendant.

CARROLL, J. In February, 1918, on petition of the plaintiff in the Court of Chancery in the State of New Jersey, — it appearing in divorce proceedings instituted by the defendant that the plaintiff and the defendant were lawfully married in 1899 and the defendant without justifiable cause abandoned, and neglected to provide for, the plaintiff, — the defendant was ordered to pay her "Ten dollars per week from and after the date of the filing of the bill of complaint in this cause [August 16, 1915] for and towards the support and maintenance of the complainant and her infant child." On May 31 an execution issued on this decree for the sum of \$1,248 for "arrears of alimony and maintenance and . . . \$161.72 costs," against the "goods and chattels" and "the lands, tenements, hereditaments and real estate" of the defendant.

In July, 1918, the plaintiff brought a bill in equity in the Superior Court, Franklin County, alleging that she is the wife of the defendant; that the defendant had failed to make the payments decreed; that "said judgment by said decree is in full force and has not been reversed, annulled or satisfied in whole or in part; . . . that the defendant has removed . . . to the Commonwealth

of Massachusetts, so that said execution cannot be levied upon his body; and that the defendant has no goods or estate in the State of New Jersey," and praying that "judgment be entered for the plaintiff" and "that a decree be entered authorizing execution to issue in this Commonwealth for the amount due on said execution" with interest and costs. The defendant demurred to this bill. The demurrer was overruled, and no appeal was taken from the order overruling the demurrer. The defendant answered, the case came on for hearing before a judge of the Superior Court and a final decree was entered ordering the defendant to pay to the plaintiff the sum of \$1,435.09 and \$17.89 costs, and that execution issue therefor. There was no appeal from this decree, and to enforce it these proceedings for contempt were instituted. The plaintiff moving for an order of notice to the defendant to show cause why he should not be adjudged in contempt, the judge of the Superior Court ruled that the court had no jurisdiction to punish the defendant for contempt for failing to pay money according to the decree of the Superior Court, "when that decree is based upon a decree of a New Jersey court, in separate support or divorce proceedings," and reported the case with the stipulation that, if his ruling was right, the motion should be overruled; and, if his ruling was wrong, the motion was to stand for hearing.

The right to bring an action at law or a suit in equity upon a decree of a court of a foreign State, ordering the payment of arrears of alimony, was discussed in *Page v. Page*, 189 Mass. 85. See *Allen v. Allen*, 100 Mass. 373, 375. In *Wells v. Wells*, 209 Mass. 282, it was decided that an action at law could be maintained in this Commonwealth upon a final decree of the Circuit Court of Michigan for an ascertained sum of money payable to the divorced wife for the support of herself and children. In *Taylor v. Stowe*, 218 Mass. 248, an execution for arrears of alimony was issued by the Supreme Judicial Court of Maine. The plaintiff brought an action in this Commonwealth and recovered on the decree. This court said, page 250: "The defendant became indebted to the plaintiff for the instalments of alimony as they accrued. The decree was an enforceable judgment in the State where it was rendered; and, at the latest, after execution was issued, it was not open to revision. Our duty to give effect to it clearly

results from the full faith and credit clause of the Federal Constitution." See *Sistare v. Sistare*, 218 U. S. 1.

A decree for separate maintenance or alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt, or a decree of a court of equity for the payment of money; and it is immaterial whether the original decree was based on an action of contract or on a petition for separate support in divorce proceedings. *Sistare v. Sistare*, *supra*. "Whether the original decree was founded upon a common debt or a claim for alimony is entirely immaterial. In the sister State it was known as a decree for the payment of money, and is seen in no other light." *Page v. Page*, 189 Mass. 85, 88.

The New Jersey decree directed the defendant to furnish a bond with sureties to secure the performance of the decree, and if he neglected to give such bond or provide for the payments ordered the plaintiff was at liberty to apply to the court for process of sequestration or for such other order as the court deemed equitable. These were matters of execution and were no part of the judgment. While the judgment will be enforced in our courts, the plaintiff cannot insist that the foreign judgment be executed by means of the remedies directed in the New Jersey decree. *Lynde v. Lynde*, 181 U. S. 183. That decree, when it is before the courts of this Commonwealth for enforcement, is a decree merely for the payment of money.

The record presents, on the point reported, the single question whether a court of equity has jurisdiction to enforce a decree by contempt proceedings when that decree is merely for the payment of money. Originally the only way by which a court of equity could enforce its decrees was by process of contempt with imprisonment and sequestration of property, and until the power was conferred by statute or rule of court, a court of equity could not issue an execution in common form. This was true of a decree for the payment of money and such a decree was enforced by a process of attachment for contempt, and not by execution as in an action at law. See Dan. Ch. Pl. & Pr. (6th Am. ed.) 1032, 1042; 10 R. C. L. 353; *Orchard v. Hughes*, 1 Wall. 73, 77; *Noonan v. Lee*, 2 Black, 499, 509. Power is now given by R. L. c. 159, § 39, to courts of equity to issue writs of execution in common form for the enforcement of their decrees if such process is appropriate,

and also by Equity Rule 37, which rule provides that where a decree in equity is solely for the payment of money, final process to execute the decree may be by writ of execution in common form. See *Burrows v. Purple*, 107 Mass. 428, 434; *Slade v. Slade*, 106 Mass. 499, 500.

Although in modern practice a money decree in equity is generally enforced by process of execution as in ordinary cases and not by contempt proceedings,—see *Clements v. Tillman*, 79 Ga. 451; *Baily v. Hornthal*, 154 N. Y. 648; U. S. Equity Rule 8; Equity Rule 37; *Martin v. Barnes*, 214 Mass. 29; see, in this connection, *Davis v. Davis*, 9 L. R. A. (N. S.) 1071; *Bennett v. Bennett*, 18 Dick. 306,—nevertheless a court of equity still retains its jurisdiction to enforce or carry out its decrees, including a decree for the payment of money, by proceedings for contempt. See Dan. Ch. Pl. & Pr. *supra*; *Jones v. Boston Mill Corp.* 4 Pick. 507. And this power to enforce a money decree by attachment for contempt is no greater than the power conferred by R. L. c. 168, §§ 80, 81. *Brown's Case*, 173 Mass. 498. It follows that the court had jurisdiction to enforce its decree for a money payment by issuing an attachment for contempt, and the ruling of the Superior Court that it “had no jurisdiction to punish the defendant for contempt in failing to pay money according to a decree of that court, when that decree is based upon a decree of a New Jersey court in separate support or divorce proceedings in New Jersey” was wrong.

According to the terms of the report, the motion is to stand for a hearing.

So ordered.

HARRY EDELSTONE & another vs. HARRY SCHIMMEL.
SAME vs. SAME.

Suffolk. January 6, 7, 1919. — May 20, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Sale, Delivery, Repudiation. Bill of Lading. Contract, Performance and breach. Damages, For breach by purchaser of contract of sale.

If, at the trial of an action in the Municipal Court of the City of Boston for the price of goods alleged to have been sold and delivered by the plaintiff to the defendant, it appears that a memorandum of the sale directed delivery of the goods to a carrier in Boston, freight to be paid by the defendant, and the plaintiff so delivered them, addressed to the defendant as consignee, and received from the carrier a non-negotiable bill of lading naming the defendant as consignee, which the plaintiff retained, giving no notice to the defendant respecting it; and if the bill of lading is not introduced in evidence and the testimony as to the ability of the defendant to procure the goods without it is conflicting and the judge makes no express finding respecting it and its effect on delivery to the defendant and finds for the plaintiff, it must be assumed, upon an appeal by the plaintiff from an order of the Appellate Division vacating the finding and ordering judgment for the defendant, that the mere failure of the plaintiff to forward the non-negotiable bill of lading to the defendant had no effect upon the defendant's right to demand delivery of the goods.

As a general rule, a non-negotiable contract of shipment is discharged by delivery of the goods to the consignee without the surrender or production of the bill of lading.

In the action above described, it was *held* that the general finding by the trial judge for the plaintiff imported a finding that the goods were delivered to the defendant, and that such a finding was warranted by the evidence.

The mere facts that, in the action above described, it also appeared that, after the plaintiff delivered the goods to the carrier, consigned to the defendant, he notified the carrier not to deliver them to the defendant and wrote to the defendant in an endeavor to get him to pay the purchase price before it was due, were *held* not to be of decisive consequence, and to be ineffectual to restore to the plaintiff title to the goods which had vested in the defendant upon delivery to the carrier.

Where, at the trial of an action for a breach of a contract of sale by a purchaser of goods sold by an oral contract of sale, it appears that, in the making of a sales slip by the vendor, which was handed to the purchaser, a clerical error occurred in stating the price too low, and that the purchaser seized upon such clerical error and persistently declared to the vendor that the slip as made expressed the true terms of the contract, such conduct on his part may be found to constitute a repudiation of the contract.

Utter denial of an essential term of a contract may be found to be a disavowal of the contract.

In an action by a vendor of goods against a purchaser for damages resulting from a repudiation of the sale, it is proper to assess as damages the amount, if any, by which the contract price exceeds the market price of the goods at the time and place fixed by the contract for performance.

In the action described above it appeared that the contract of sale was made on a December 29, and delivery was to be at some time before January 8 following, and the plaintiff's evidence tended to show that there was no general market for the goods at the time and place agreed upon for delivery, but that, at about that time, the price had advanced so that the goods were from one quarter to three quarters of a cent per pound greater than the contract price. The evidence of the defendant tended to show that there was a market price for the goods at the time and place agreed upon for delivery, that that price never was greater than one cent less than the contract price and during the months preceding the time of the making of the contract varied from one and one half of a cent to one cent below the contract price. The judge found that at the time and place agreed upon for delivery the market value of the goods was sixty-five one hundredths of one cent less than the contract price. *Held*, that such a finding, while founded upon slight evidence, could not be said to be unwarranted.

TWO ACTIONS OF CONTRACT, the first action being for \$222.91, the purchase price of ten bales of oil mill motes alleged to have been sold and delivered to the defendant, and the second action being for damages due to a refusal of the defendant to carry out the terms of a sale to him of twenty-three thousand pounds of willowed picker, a quality of damaged cotton. Writs in the Municipal Court of the City of Boston dated March 6, 1917.

In the Municipal Court the cases were tried together.

The evidence in the second action on the question of damages was as follows: The plaintiffs testified that there was no general market price for the willowed picker, but that in early January, 1917, the price had advanced and the goods were worth from six to six and a half cents per pound. The defendant testified that there was a market price in the latter part of 1916 for willowed picker in the kind and quality purchased by him from the plaintiffs; that in the fall and winter of 1916 it was never over four and three quarters cents per pound, and that it fluctuated in the fall of 1916 between four and one half and four and three quarters cents per pound; and that in January, when the market was somewhat stronger the willowed picker was about four and three quarters cents per pound; that there were many grades of willowed picker, probably two dozen, of varying color and staple and mainly dependent upon the foreign substances in the picker; that the

market price of the picker in question had never been as high as five and three quarters cents per pound in the latter part of 1916. Two experts in the cotton waste business testified for the defendant that there was a recognized market price on willowed picker, that the willowed picker in question was never above five cents per pound the latter part of 1916, and that it fluctuated between four and one quarter cents and four and three quarters cents per pound. One of these testified that the price might vary in accordance with the needs of the buyer, and such variation might be three quarters to one cent per pound, depending also upon the grade of the particular lot. On the question of damages in the second action the judge ruled and found as follows: "The measure of damages is the difference between the market price at the time and place of delivery, and the contract price, which I fix at .0065 per pound. 23,000-times .0065 equals \$149.50."

Other material evidence and certain findings of fact by the judge are described in the opinion. The judge found for the plaintiffs in both actions, in the first in the sum of \$229.13, and in the second in the sum of \$149.50, refusing certain requests of the defendant for rulings raising the questions described in the opinion; and at the request of the defendant reported both cases to the Appellate Division.

The Appellate Division made an order in the first action vacating the finding for the plaintiffs and ordering judgment for the defendant, and the plaintiffs appealed.

In the second action the Appellate Division ordered that the report be dismissed; and the defendant appealed.

P. Rubenstein, for the plaintiffs.

L. R. Eyges, (*S. B. Finkel* with him,) for the defendant.

RUGG, C. J. These are two actions of contracts based upon sales of goods. For convenience we treat each case separately.

First Case.

This is an action to recover for goods sold and delivered. On December 29, 1916, the defendant at the plaintiffs' place of business in Boston made an agreement to buy of the plaintiffs "ten (10) bales of oil mill motes at $4\frac{1}{4}$ c. per pound, F. O. B. Boston, terms 1%, 10 net 30 days, to be shipped by the N. Y., N. H. &

H. R. R. — to be shipped at once to New York.” There was no dispute between the parties as to the terms of this agreement. These goods were shipped to the defendant by the carrier named on December 30, 1916, and a non-negotiable bill of lading was issued on that date, the defendant being named as consignee. This bill of lading was not forwarded to the defendant, but was retained by the plaintiffs, who sent no notice to the defendant respecting it. Owing to other differences between the parties, the plaintiffs on January 11, 1917, and again four days later, wrote in substance to the defendant that they would not deliver to him the oil mill notes unless he accepted and paid demand or sight draft less one per cent discount. The plaintiffs also notified the carrier at Boston, on January 9, not to deliver the mill notes to the defendant. The defendant on January 11, 1917, brought an action in New York City for breach of contract and there attached goods of the plaintiffs alleged to be in the possession of the New York, New Haven, and Hartford Railroad.

The bill of lading is not printed in the record. The plaintiffs testified that the “defendant could get the goods on arrival without bill of lading.” The defendant testified that without the “bill of lading, as matters stood, he could not get possession of the mill notes.” The court refused to grant the defendant’s sixth request for ruling, which amongst other matters contained a statement of fact to the effect that the defendant could not obtain the possession of the notes without the bill of lading. There was no other evidence and no express finding respecting the bill of lading and its effect on delivery to the defendant in New York. Under the circumstances it must be assumed that mere failure of the plaintiffs to forward it to the defendant had no effect on his right to demand delivery of the goods in New York. See, in this connection, *In Matter of Bills of Lading*, 14 I. C. C. Rep. 346, and *New York Central & Hudson River Railroad v. York & Whitney Co.* 230 Mass. 206, 213, 217. It is the general rule that a non-negotiable contract of shipment by a common carrier is discharged by delivery to the consignee without the surrender or production of the bill of lading. The fact that one is consignee is evidence of ownership. *Brown v. Floersheim Mercantile Co.* 206 Mass. 373, 375. *Rosenbush v. Bernheimer*, 211 Mass. 146, 149, 151.

The contract between the parties was plain. The ordinary rule is that, in case of sales of goods to be shipped by the vendor from one place to another, delivery to the carrier is delivery to the buyer unless there is special agreement to the contrary. *Fechteler v. Whittemore*, 205 Mass. 6, 11. *Twitchell-Champlin Co. v. Radovsky*, 207 Mass. 72, 75. *Levy v. Radkay*, 233 Mass. 29, Sales act, St. 1908, c. 237, §§ 19 and 46. Delivery of the goods to the carrier together with the taking of a non-negotiable bill of lading in the name of the defendant was strong proof of intention by the plaintiffs to transfer the title to the defendant. *Wigton v. Bowley*, 130 Mass. 252. The general finding of the trial judge in favor of the plaintiffs imported a finding in their favor on the point of delivery.

The attempt of the plaintiffs by notice to the carrier not to deliver to the defendant was not of decisive consequence. The goods theretofore had been delivered to the carrier; it held as bailee for the defendant to whom the title had passed. The letters of the plaintiffs endeavoring to get the defendant to pay before the due date of the contract were ineffectual to restore to them a title which already had vested in the defendant. These subsequent acts of the plaintiffs had no effect upon substantial elements of the contract which were already executed. *R. H. White Co. v. Jerome H. Remick & Co.* 198 Mass. 41, 48. *Daley v. People's Building, Loan & Savings Association*, 178 Mass. 13, 18. The finding of fact of the trial judge in favor of the plaintiffs was warranted by the evidence. No error of law is disclosed on the record.

The finding of the judge for the plaintiffs is to stand and judgment is to be entered accordingly.

So ordered.

Second Case.

This is an action to recover damages for breach of a contract by the defendant to buy of the plaintiffs a car of willowed picker at five and three quarters cents per pound. The negotiations were oral. When the bargain was struck, an unsigned memorandum dictated by one of the plaintiffs was written, in which the price was stated as four and three quarters cents per pound. The judge found on conflicting evidence that this was a mistake and that

the price agreed upon was five and three quarters cents per pound, that the defendant repudiated the sale, and that until such repudiation the plaintiffs were ready and willing to perform the contract, and that thereafter the plaintiffs resumed control of the property. The evidence disclosed by the record plainly warranted the finding that the terms of the agreement actually made were clear, that the defendant seized upon the clerical error in the sales slip or memorandum and persistently declared that that expressed the terms of the contract. His conduct in this connection constituted a repudiation of the only contract made. Utter denial of an essential term of a contract may be equivalent to a disavowal of the contract. Moreover, the defendant refused seasonably to give shipping instructions. *Mullaly v. Austin*, 97 Mass. 30. *King v. Faist*, 161 Mass. 449. *Kehler Flour Mills Co. v. Linden*, 230 Mass. 119, 130.

The correct rule of law was followed in assessing damages. It was the difference between the contract price and the fair market price at the time and place fixed by the contract for performance. *Barrie v. Quinby*, 206 Mass. 259, 268. The evidence, while slight upon this point, cannot be pronounced insufficient to warrant the finding. *Houghton v. Furbush*, 185 Mass. 251. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1, 8.

Order dismissing report affirmed.

WINCHESTER ROCK AND BRICK COMPANY vs. ALBERT B.
MURDOUGH.

Suffolk. January 7, 1919. — May 20, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Pledge, Sale on default. *Equity Jurisdiction*, To redeem from sale of personal property by pledgee.

In a suit in equity by a corporation to set aside a sale by the defendant on default of bonds of the plaintiff of the face value of \$1,500 pledged to the defendant to secure the payment of a note of the plaintiff for that amount, it appeared that by the terms of the note the defendant was authorized to sell the bonds, "either at public or private sale," or otherwise at his option on the non-payment of the note, and to purchase at any such sale, that the defendant had recovered judg-

ment against the plaintiff in an action on the note, and thereafter had sold the bonds held as collateral at public auction and bought them himself for \$15. The plaintiff contended that the sale was not made in good faith. There was evidence on which it could be found that demand had been made for the payment of the note before its maturity and that the defendant then was informed by the plaintiff, that it would be unable to take care of its note by reason of the foreclosure of its property by the trustees under the mortgage securing its bonds, that the bonds held as collateral were retained by the defendant until more than a year after the maturity of the note, that notice in writing was given to the plaintiff of the time and place of the sale of the bonds, which was to be held two months after the notice, that no reply to this notice was received and no effort was made by the plaintiff to protect its interests, that the defendant endeavored before the sale, but without success, to get an offer for or quotation on the bonds, and that he gave notice of the sale to several persons who he thought might be interested, including one of the trustees who were in possession of the plaintiff's property under the foreclosure. There was nothing to show that there was any market value of the bonds. No place of sale was specified in the note and the bonds were sold at the defendant's office in a town near Boston. There was no newspaper advertisement of the sale and only one person other than the defendant and the auctioneer was present thereat. The trial judge found that the sale was made in good faith without intention to take advantage of the plaintiff and in the exercise of reasonable care, and made a decree dismissing the bill. On appeal it was *held* that the findings of the judge were warranted by the evidence and were not plainly wrong.

BILL IN EQUITY, filed in the Superior Court on January 25, 1918, by a corporation organized under the laws of the State of Maine, conducting a rock quarry on land belonging to it in the towns of Winchester and Woburn and having its principal office in Boston, to set aside a sale of bonds of the plaintiff of the face value of \$1,500 which had been pledged by it to the defendant as collateral security for a note of the plaintiff payable to the defendant for \$1,500, and also to redeem the bonds from such sale, the sale being alleged to have been a mere device and pretence and not to have been carried out in good faith.

The case was heard by *Wait, J.* The evidence, which was reported by a commissioner appointed under Equity Rule 35, is described in the opinion. The judge made the following memorandum and order for a decree:

"The only question upon which the parties are at issue is whether the sale of the security made by the defendant in July of 1916 was so conducted that the plaintiff is entitled to disregard it and hold the defendant to account for a greater sum than the \$15 which he then paid.

"The obligor had defaulted; the trustees of the bond issue had

taken possession of the property mortgaged to secure the bonds. The outcome of the obligor's affairs was doubtful, though the trustees and insiders were hopeful. There was no one in position to pay the debt secured.

"There was a sale made at R. L. Day & Co.'s sale on July 19, 1916, at which a par of \$10,000 of the bonds brought \$5,000, but the defendant did not know of this sale, and might well have distrusted it, had he known of it.

"While one with inside information might well have paid 50 for the bonds and certainly would not have let them go at \$15 for \$1,500 face value, I am not satisfied the ordinary purchaser at sales of unlisted bonds would have given much more.

"The defendant gave ample and careful notice to the obligor of the time and place of the sale. It was made with due solemnity by a licensed auctioneer. There was no intention on the part of the defendant to take any advantage, and I am not certain that he felt any assurance at the time that he was getting a remarkably good bargain.

"The obligor did nothing to protect the security; though, in fact, at the moment it was without funds to purchase itself.

"There is nothing in the evidence to satisfy me that the defendant intended to do less than justice to the obligor. The sale must stand, unless the fact, that the sale was not held in Boston and by a seller of unlisted stocks and bonds, renders it invalid, and possibly the fact, that only the auctioneer, the defendant and a friend of the defendant, induced by him to be present and bid, were present.

"The cases do not seem to me to require more than good faith and reasonable care. The good faith was certainly in existence; and the evidence fails to convince me that the defendant ought to have expected — after the unsuccessful attempts he had made to get purchasers — that further effort or delay would produce a substantially better result for his debtor.

"Let the bill be dismissed without costs."

Later by order of the judge a final decree was entered ordering that the plaintiff's bill be dismissed without costs. The plaintiff appealed.

The defendant's bill of exceptions, which became immaterial and was waived, referred to at the end of the opinion, related to the

conditional denial by *Wait, J.*, of a motion of the defendant that the plaintiff's appeal be dismissed for want of prosecution.

A. Berenson, for the plaintiff.

A. S. Allen, for the defendant.

RUGG, C. J. This is a suit in equity whereby the plaintiff seeks to set aside the sale of certain bonds formerly held by the defendant as collateral security for a note of the plaintiff and to redeem the bonds. The defendant owned a note of the plaintiff for \$1,500, which fell due on or about June 25, 1915. He held as collateral security for the note bonds of the plaintiff of the face value of \$1,500, which were secured by a mortgage indenture upon real estate. According to the terms of the note, the defendant was authorized to sell the bonds "either at public or private sale," or otherwise, at his option on the non-payment of the note, and to purchase at any such sale.

On or about April 10, 1915, more than two months before the maturity of the defendant's note, the plaintiff having failed to pay coupons upon its bonds, the trustees under the indenture took possession of the real estate and other property of the plaintiff and conducted its business until January 5, 1918; and on October 6, 1915, the defendant brought suit on his note, and the defendant therein, the plaintiff here, although entering an appearance, made no contest as to its liability and the defendant recovered judgment accordingly. The bonds held as collateral were sold by the defendant at public auction on July 31, 1916, and were bought by him for \$15. The plaintiff contends that this sale ought to be set aside because it alleges that it was a mere device and pretence and not conducted in good faith and hence not valid.

The case was heard by a judge of the Superior Court, who found that the sale was made in good faith without intent to take advantage, after careful and ample notice to the plaintiff of the time and place of sale, with due solemnity by a licensed auctioneer, and in the exercise of reasonable care. A decree was entered dismissing the bill.

The familiar rule is that upon an appeal in equity it is the duty of this court to examine the evidence and decide the case according to their judgment, giving due weight to the findings made, but that, since the trial court has had the advantage of seeing the witnesses and weighing their testimony in the light of their

appearance, his finding will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200. A mortgagee, lienor or holder of collateral in making sale of security under a power is bound to exercise good faith and reasonable diligence in an effort to secure a fair price for the property and thus not only to assure his own rights but also to protect the interests of those whose claims are subsidiary or junior to his own. *Bon v. Graves*, 216 Mass. 440, 446.

There was evidence tending to show that demand was made for the payment of the note before its maturity and the defendant was advised by the plaintiff that it would be unable to take care of the note by reason of the foreclosure by the trustees under the mortgage. There was some correspondence between the parties at about the time of the action and judgment on the note. The collateral was not sold until more than a year after the maturity of the note. On June 1, 1916, written notice was given to the plaintiff of the time and place of the sale, which was not to take place until July 31 following, substantially two months later. No reply was made to this notice and no effort was made by the plaintiff to protect its interests. The defendant endeavored before the sale, through two brokers engaged partly at least in dealing in such securities, to get an offer or quotation on the bonds, but without success. He gave notice of the sale to several people whom he thought might be interested, including one of the trustees in possession of the plaintiff's property. Whatever may have been the ultimate value of the property secured by the bonds, there is nothing to show that there was any general market for the bonds. The property was in the hands of trustees under a mortgage indenture. The value of the property and its prospects of future success in the nature of things were extremely uncertain. The facts that the bonds were sold at the defendant's office in a town near Boston instead of through stockbrokers, and that there was no newspaper advertisement of the sale, and that there was only one person present other than the defendant and the auctioneer, in connection with all the other circumstances, are not enough to require a finding of want of good faith or of reasonable prudence in conducting the sale. Mere inadequacy of price is not enough to set aside a foreclosure sale. The place of sale was not specified in the agreement, and that it was not in Boston cannot be said of itself to be conclusive of bad faith or want of prudence. The evi-

dence need not be recited in further detail. The findings of the judge are supported by the testimony and are not plainly wrong. The case is governed in principle by *Jennings v. Moore*, 189 Mass. 197, *Guinzburg v. H. W. Downs Co.* 165 Mass. 467, *Farmers National Bank of Annapolis v. Venner*, 192 Mass. 531.

In view of the conclusion here reached, the defendant does not insist upon his exceptions but waives them.

Decree affirmed with costs of appeal.

Defendant's exceptions waived.



JAMES A. NOYES, executor, vs. ELBRIDGE NOYES.

Essex. January 8, 1919. — May 20, 1919.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Election. Equity Jurisdiction, To restrain prosecution of action at law. Practice, Civil, Equitable defence. Waiver.

In a suit in equity, by one as the surviving executor of the will of his father and also as devisee under that will against his brother; to enjoin the further prosecution by the defendant of an action at law on an agreement in writing executed by the plaintiff's testator about seventeen years before his death, it appeared that by the agreement sued upon in the action at law the testator promised that, if the present defendant would stay on the testator's farm and manage it for him in his old age, the testator would give the present defendant his homestead place, all his adjoining meadow, the "Knight" pasture, the "Highfield" pasture and all his live stock and farming implements. By a will executed more than seven years later and proved on the death of the testator nearly ten years after its execution, the testator gave the homestead place to the plaintiff, divided the "Knight" pasture and the "Highfield" pasture between the plaintiff and the defendant and gave to them his live stock and farming implements in equal shares, expressing a desire that his two sons should occupy the homestead and farm together as long as they could agree to do so. He gave the defendant four different lots of land not mentioned in the agreement and also a substantial amount of personal property not there mentioned. The defendant expressed no dissatisfaction with the will and shortly after its allowance took possession of the property devised and bequeathed by it to him and proceeded for several months to occupy and manage the farm jointly with the plaintiff. Afterwards the brothers separated and divided the live stock and farming implements and the defendant kept and continued to occupy and use as his own the property devised and bequeathed to him by the will. More than a year after the testator's death the defendant found the agreement in writing and brought the

action at law upon it against the plaintiff and another as the executors of the will. In this action the plaintiff as one of the defendant executors did not set up the equitable defence that the present defendant was precluded by his election in accepting the benefits of the will from setting up the agreement inconsistent with its provisions, and the plaintiff obtained a verdict, exceptions of the defendant being overruled by this court. *Held*, that the defendant had elected to accept the benefits of the will and thereby had lost his right to enforce the provisions of the earlier contract which would prevent its operation, and that the plaintiff was entitled to an injunction restraining the defendant from further prosecuting his action at law.

In the same case it also was *held* that the plaintiff, who in the action at law was sued as one of the executors, did not waive his right to assert his individual claim as devisee and legatee under his father's will by failing to set up as executor in the action at law the equitable defence of election under R. L. c. 173, § 28, as amended by St. 1913, c. 307.

It also was *held* that for the reason given above a denial in the action at law of a motion of the present plaintiff as one of the executors for a new trial in which to set up the principle of election did not affect the plaintiff's individual right to relief in the present suit.

In the same case it was *said* that it was not necessary to determine what might have been the effect of these matters if the present suit had been brought by the plaintiff merely as executor.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 23, 1916, and amended as of August 30, 1916, by the surviving executor of the will of James Noyes, the father of the plaintiff and the defendant and by the plaintiff individually as devisee under that will, to enjoin the defendant from the further prosecution of an action at law, brought by him against the plaintiff and another as the executors of the will of James Noyes, on an alleged agreement in writing, quoted in the opinion, which action was before this court, as reported in 224 Mass. 125.

The defendant demurred to the bill, and the demurrer was argued before *Braley, J.*, who made an interlocutory decree overruling it. The defendant appealed. The case was referred to a master, who filed a report, and later came on to be heard before *Braley, J.*, who, at the request of the parties, reserved it upon the pleadings, the appeal from the interlocutory decree overruling the demurrer and the master's report for determination by the full court. The facts as found by the master are stated in the opinion.

E. E. Crawshaw, for the defendant.

B. B. Jones, (*E. Foss* with him,) for the plaintiff.

Rugg, C. J. This suit in equity is brought by the plaintiff, both as surviving executor of the will of James Noyes and as devisee

under that will in his personal right, to enjoin the defendant from further prosecuting an action at law upon a written agreement executed by the testator. A demurrer to the bill was overruled. Then the case was sent to a master, who has filed an elaborate report, and it comes before us on a reservation for determination upon the pleadings, the demurrer and the master's report.

The relevant facts are these: James Noyes died in January, 1913, leaving real estate of the value of \$10,935 and personal estate of the value of \$12,921.44, aggregating \$23,856.44. By his will, executed on July 3, 1903, and admitted to probate on April 21, 1913, he made specific devises and bequests, which, together with the values of the several properties at the time of the testator's death so far as now pertinent are these: To the defendant he gave, "The Jerry field \$600, The Ilsley field \$650, The barn lot \$200, The Smith lot \$250, $\frac{1}{2}$ Bradley meadow \$75, $\frac{1}{2}$ Highfield pasture \$500, $\frac{1}{2}$ Knight pasture \$300, $\frac{1}{2}$ stock, farm implements, carts and wagons \$1,287.50, [total] \$3,862.50." To the plaintiff he gave, "The homestead \$6,168.46, The Cook lot \$60, The Pettingell meadow \$60, The Newhall lot \$300, $\frac{1}{2}$ Highfield pasture \$500, $\frac{1}{2}$ Knight pasture \$300, $\frac{1}{2}$ Bradley meadow \$75, $\frac{1}{2}$ stock, farm implements, carts and wagons \$1,287.50, [total] \$8,750.96." The clause of the will whereby the stock, farm implements, carts and wagons were given in equal shares to the plaintiff and the defendant contained these words: "it being my desire that my two sons James Addison and Elbridge shall occupy my homestead and farm together as long as they can agree to do so. In case they should decide to separate, I provide that my son Elbridge shall be given a suitable time in which to arrange for the removal of his share of the live stock, farming tools &c. and that that time be not less than sixty days." The will was read on the day of the funeral in the presence of most of the heirs at law, including the defendant. He expressed no dissatisfaction with it. Shortly after the allowance of the will he took possession of the property by it devised and bequeathed to him and proceeded for several months to occupy and manage the farm jointly with the plaintiff pursuant to the desire of the father expressed in his will. It was the defendant's intention at this time to try to get on with his brother, the plaintiff, and to carry out the terms of the will of his father. In November, 1913, the brothers separated, and the

live stock, farming tools and crops were divided between them and they ceased to carry on the farm together. Since then the defendant has retained possession of the real and personal property given him by the will and used it as his own. In April, 1914, the defendant wrote to the executors a letter in which he made claim to \$300 per year for services for nineteen years and for the first time referred to an agreement whereby his father had promised him the homestead. He had not then found the written agreement, but in July, 1914, he brought the action at law (sought by the suit at bar to be enjoined) to recover damages arising from the breach by his father of an agreement in writing of the tenor following: "December 4, 1895. This is to certify that I, James Noyes, do promise to give to my son Elbridge Noyes my homestead place, all of my adjoining meadow, my Knight pasture, Highfield pasture, all of my stock, consisting of cows, horses, hogs, and all of my farming implements, carts, wagons, so forth, in consideration that he remain on the farm and manage the same for me in my old age; if he should leave at any time this agreement shall be valid and he shall share as I may make further provisions. James Noyes. And I, Elbridge Noyes, do promise to stay on the farm and comply with the above wishes and to carry out this agreement with my father James Noyes to the best of my ability. Elbridge Noyes." Of the property described in this agreement, the will made specific disposition of the homestead wholly to the plaintiff, and divided the Knight pasture, the Highfield pasture and the stock, farm implements, carts and wagons equally between the plaintiff and the defendant. The defendant's action at law on the agreement ultimately resulted in a verdict in his favor. See *Noyes v. Noyes*, 224 Mass. 125.

The provisions of the will for the defendant and the terms of his contract with the testator present a case for the application of the doctrine of election. That doctrine is well established in Massachusetts. It was stated by Chief Justice Shaw in *Hyde v. Baldwin*, 17 Pick. 303, at page 308, in these words: "If any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will, or in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat,

or in any way prevent the full effect and operation of every part of the will." *Watson v. Watson*, 128 Mass. 152. *Smith v. Wells*, 134 Mass. 11. *Tyler v. Wheeler*, 160 Mass. 206, 209. The rule of election has been expressed in various phrases with reference to different states of facts. It was said by Lord Chancellor Cairns in *Codrington v. Codrington*, L. R. 7 H. L. 854, 861, "By the well settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate,' and in our courts more commonly the doctrine of 'election,' where a deed or will profess to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them." "The general rule is, that a person cannot accept and reject the same instrument: and this is the foundation of the law of election." *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, 449. It was stated by Lord Hatherley in *Cooper v. Cooper*, L. R. 7 H. L. 53, 69, 70, as follows: "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit: and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."

The defendant accepted devises of at least four parcels of land under the will, which were not included nor mentioned in his contract, and entered into possession of them and has continued to hold them. Their total value was \$1,700. He also has continued in possession of other property given him by the will of a value of over \$2,100. The contract between the defendant and his father, the testator, was of such a nature that specific performance of its provisions could have been decreed if the former had sought that remedy and had prevailed on the facts. That contract related to real property and specified personal property, which of course could not have been bought in the general market. *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 130. Contracts as to the disposition of one's property after death may be specifi-

cally enforced in equity. *Howe v. Watson*, 179 Mass. 30. *Murphy v. Murphy*, 217 Mass. 233. If the defendant had undertaken to enforce specific performance of his contract, and had succeeded in proving the contract, he would have deprived the plaintiff entirely of the homestead and of one half of the Highfield pasture, of the Knight pasture and of the stock, farm implements, carts and wagons, which by the will were specifically given to the plaintiff. Thus he would have prevented the operation of the will as to these definite estates and goods. Manifestly it would be contrary to the doctrine of election to endeavor to profit by the will to the extent of its benefits conferred on him and at the same time thwart the working of the will upon most of the property therein given to the plaintiff. A party cannot evade the effect of a principle of substantive law merely by shifting the form of action. It is elementary that equity looks through form to substance. If the effect of enforcing the contract by action for its breach is to prevent the operation of the will as to substantial provisions, then the defendant is as much precluded from enforcing it by that form of action as he would be by suit for specific performance. There is no distinction in essence between the case at bar and the case where a testator by will devises Blackacre, which belongs to A, to B, and devises Whiteacre, of which the testator is seized, to A. Yet it is too well settled for discussion that A cannot claim the devise of Whiteacre without releasing Blackacre to B. The defendant stands on no higher or more secure ground because he had a contract for the conveyance or devise of the homestead and other property than he would have stood if he had owned it in fee. Plainly the testator could not have intended both his will and his contract with the defendant to stand. Their provisions are utterly incompatible. The benefactions given by the will to the plaintiff are repugnant in every particular to the terms of the contract with the defendant.

There is no room for a contention that there was mistake or oversight on the part of the testator. His expression of desire in the will that the defendant live on the farm with the plaintiff and that, if they decided to separate, the defendant should be given a reasonable time within which to remove, demonstrate that the testator had abandoned whatever idea he once may have entertained that the homestead should go to the defendant. The case

as now presented is not one where all provisions of the will must wait on the payment of damages for breach of the contract sought to be enforced by the defendant by his action at law. That is not a mere pecuniary obligation, but an agreement for the transfer of specific property.

The contract and the will cannot both stand according to their express terms. But the defendant as a beneficiary under the will, who has in that respect accepted its provisions, is barred from enforcing his contract to the extent of preventing the operation of the will as to other beneficiaries. The defendant therefore comes within the scope of the doctrine of election. He must either relinquish his own benefits under the will and rely wholly on his contract, or abandon the contract if he chooses to accept the provisions of the will in his behalf. He has made his election. He chose at the outset to take his benefactions under the will and has continued constant in that course. *Hyde v. Baldwin*, 17 Pick. 303. *Gorham v. Dodge*, 122 Ill. 528. *Towle v. Towle*, 79 Wis. 596. *Utermehle v. Norment*, 197 U. S. 40. *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A. C. 266, 274. *Jackson v. Bevins*, 74 Conn. 96, 100. *Drake v. Wild*, 70 Vt. 52, 57. *Wise v. Rhodes*, 84 Penn. St. 402. *Cox v. Rogers*, 77 Penn. St. 160. *Bigelow on Estoppel*, (6th ed.) 733, 734, and cases there collected.

The plaintiff in his capacity as executor might have set up the defence of election by answer in the action at law. *Watson v. Watson*, 128 Mass. 152. R. L. c. 173, § 28, as amended by St. 1913, c. 307. But ordinarily the remedy of an independent suit in equity is concurrent. *J. B. Eustis Manuf. Co. v. Saco Brick Co.* 198 Mass. 212, 217. There is jurisdiction in equity to enjoin the enforcement of a common law judgment. *Brooks v. Twitchell*, 182 Mass. 443.

That equitable defence was not pleaded in the action at law brought by the defendant against the executors of the will of his father. No reference is made to it by name. The paragraphs in that answer, pleading as credits upon the plaintiff's claim the amounts received by him under the will, relate to a defence of a different kind. It was so held in *Noyes v. Noyes*, 224 Mass. 125, 134.

Fundamentally, the reason why the plaintiff may proceed at equity by the present suit is that he appears now in his personal

capacity as a devisee and legatee under his father's will, whose individual property rights as such devisee and legatee will be affected by the enforcement of the action against him as executor. In this capacity he does not stand as he would if his rights were alone those of the executor of the will, but he asserts independent rights. *McCarthy v. William H. Wood Lumber Co.* 219 Mass. 566, and cases there collected. *Wall v. Massachusetts Northeastern Street Railway*, 229 Mass. 506. The conduct of the executor does not bind the plaintiff in his individual capacity in this particular. The failure to plead election as a defence to the action at law on the contract by the defendant does not preclude the plaintiff in his individual capacity from now relying upon that doctrine. In this view of the case the question of accident, mistake or ignorance of the plaintiff in omitting to raise the question of election in the action against him as executor is not material. The denial of the motion for a new trial setting up the principle of election does not bar him. It is not necessary to determine what might be the effect of these factors against the estate of the testator, if it alone were concerned in the present suit. Therefore, cases like *Fuller v. Cadwell*, 6 Allen, 503, *Payson v. Lamson*, 134 Mass. 593, and *Boston & Maine Railroad v. D'Almeida*, 221 Mass. 380, relied upon by the defendant, are not controlling.

A decree is to be entered affirming the interlocutory decree which overruled the demurrer, and enjoining the defendant from further prosecuting his action at law, but without costs.

So ordered.



MARY J. E. PURCELL & another, special administrators,
vs. JAMES F. PURCELL.

Middlesex. March 4, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Executor and Administrator, Special administration. Probate Court.

When an appeal is pending from a decree of the Probate Court allowing the will of an alleged testator, the Probate Court under R. L. c. 137, §§ 10, 11, may grant to a special administrator of the testator's estate authority to prosecute a pend-

ing suit in equity brought by the testator in his lifetime to procure a reconveyance of real estate, which it is alleged that the testator was induced through the fraud and undue influence of his sons to convey to them.

APPEAL of James F. Purcell from a decree of the Probate Court for the county of Middlesex, granting to Mary J. E. Purcell and John G. Brackett, special administrators of the estate of James Purcell, late of Arlington, appointed to serve while an appeal was pending from a decree of said Probate Court allowing the alleged will of James Purcell in which the petitioners were named as executors, authority to appear in and prosecute a suit in equity brought by James Purcell and pending in the Supreme Judicial Court seeking a reconveyance of a farm in Arlington, which it was alleged that the testator was induced by the fraud and undue influence of his three sons, James F. Purcell, Edmund J. Purcell and Daniel A. M. Purcell to convey to them.

The appellant in support of his appeal filed the following objection to the decree: "The appellant says that the said Probate Court had no power or authority under the R. L. c. 137, §§ 10, 11, to enter said decree granting authority to the special administrators to institute proceedings in equity for the purpose of setting aside a deed of real estate given by the deceased to his sons, on the ground that said deed was procured by fraud or undue influence."

The case was heard by *Carroll, J.*, who made a final decree affirming the decree of the Probate Court granting the authority prayed for. The appellant, James F. Purcell, appealed.

J. P. Feeney & G. F. McKelleget, for the appellant, submitted a brief.

J. G. Brackett, for the appellees.

DE COURCY, J. Among the facts alleged in the petition are the following: James Purcell, late of Arlington, died on May 17, 1917, leaving a will in which these petitioners are named as executors. The will was allowed in the Probate Court on October 18, 1917, and the respondent appealed therefrom. Pending the appeal the petitioners were appointed special administrators of the estate; and that appointment is still in full force.

The petition further alleges that about January 7, 1916, said James Purcell, through the fraud and undue influence of his three sons, (of whom the respondent is one,) was induced to execute certain instruments purporting to transfer to them his farm and

the personal property used in connection therewith; that they occupied a fiduciary relation toward him at the time; that in January, 1916, he filed a bill in equity against his sons seeking a reconveyance of said real estate; and that the suit is still pending.

The Probate Court decreed "that said petitioners as special administrators of the estate of James Purcell be authorized and empowered for the purpose of settling the question of the validity of the title to the real and personal property above referred to, to prosecute said suit now pending in said Supreme Judicial Court or to bring a new suit for said purpose as in their judgment may be for the best interests of said estate and to prosecute such suit pending the determination of the question of the allowance of the will of said James Purcell or until further order of the court." The respondent James F. Purcell appealed to the Supreme Judicial Court, where the decree was affirmed by a single justice. On the present appeal to the full court the only question raised is whether the Probate Court had authority to enter the decree in question.

Among the provisions of R. L. c. 137, dealing with special administrators, is the following: § 10. "A special administrator shall collect all the personal property of the deceased and shall preserve the same for the executor or administrator when appointed, and for that purpose may commence and maintain suits. If he is appointed by reason of delay in granting letters testamentary, the court may authorize him to take charge of the real property of the deceased or of any part thereof, and to collect the rents, make necessary repairs and do all other things which it may consider needful for the preservation of such real property and as a charge thereon." It seems plain from this that the Probate Court in its discretion may grant to special administrators the power to prosecute the pending suit. The cause of action survived and could be prosecuted by an ordinary administrator of the estate of James Purcell, without asking leave of court. *Parker v. Simpson*, 180 Mass. 334. *Raymond v. Flint*, 225 Mass. 521. R. L. c. 171, § 17. The statute makes it the duty of these special administrators to collect the personal property of the deceased, which was included in the alleged fraudulent transfers. See *Meagher v. Kimball*, 220 Mass. 32. And where, as here, the appointment is made by reason of delay in granting letters testa-

mentary, the statute in terms empowers the court to authorize the special administrators "to take charge of the real property of the deceased . . . and do all other things which it may consider needful for the preservation of such real property." R. L. c. 137, § 10. That this power exists even where the interest of the deceased in the real estate was only an equitable one, see *Lufkin v. Jakeman*, 188 Mass. 528, 533. In *Busiere v. Reilly*, 189 Mass. 518, in circumstances similar to those here presented, a bill in equity to cancel a deed alleged to have been obtained by fraud was maintained, although originally brought by a special administrator. *Brigham v. Hunt*, 152 Mass. 257, relied on by the respondent, was a writ of entry, which at common law would abate upon the decease of the demandant; and the only persons who had a right by statute to prosecute the action after his death were his heirs or devisees.

We are of opinion that on the facts disclosed the Probate Court had power to authorize the special administrators, pending the question of the allowance of the will, to prosecute the suit already brought, or to bring a new one, in order to preserve the property of the deceased for the executor or administrator when appointed. See R. L. c. 137, § 11.

Decree affirmed, with costs.



ELBRIDGE K. JEWETT vs. MAYOR OF MEDFORD & others.

Middlesex. March 5, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Municipal Corporations, Approval by mayor, Betterment assessments. *Medford. Tax*, For betterments.

Under St. 1917, c. 344, Part III, § 1, a betterment tax for a benefit received from the laying out of a public street in a city must be assessed within two years after the passage of the order of layout, and in the city of Medford this period of limitation runs from the time when the order of layout was approved by the mayor. Under St. 1917, c. 344, Part III, § 1, "the board of city . . . officers which is authorized to lay out ways therein" is to determine whether any land receives a special benefit therefrom and the value of such betterment and to "assess upon the same a proportional share of the cost of such laying out." Under the revised

charter of the city of Medford contained in St. 1903, c. 345, as amended by Spec. St. 1915, c. 160, "the board of aldermen, with the approval of the mayor," have authority to order the laying out of streets, ways and highways in the city, "and to assess all damages therefor." The board of aldermen of Medford passed an order assessing betterments for the laying out of a street in that city. This order was presented to the mayor for his approval nine days before the expiration of the two years after the passage of the order of layout. The mayor did not approve the order of assessment and did not return it with his objections thereto within ten days thereafter. If the order was subject to the mayor's veto it would not take effect until ten days after it was presented to the mayor for approval. *Held*, that the order of assessment was subject to the mayor's veto and therefore was invalid because it was not passed within two years after the order of layout.

PETITION, filed, as amended, on November 17, 1917, by the owner of certain parcels of land on Second Street in the part of Medford known as Wellington, praying for a writ of certiorari to quash the proceedings attempting to assess a betterment upon the said land of the petitioner for the laying out of Second Street.

The case was heard by *Carroll, J.* The material facts which appeared by the record are stated in the opinion. The single justice ordered that the writ should issue as prayed for, and at the request of the respondents reported the case upon the petition as amended and the answers for determination by the full court.

A. C. York, for the respondents.

F. M. Ives, for the petitioner.

DE COURCY, J. The petitioner is the owner of certain lots of land on Second Street in Medford. On August 17, 1915, the board of aldermen passed an order laying out Second Street under the betterment act, the order was approved by the mayor on August 19, 1915, and the street was accordingly laid out. On August 7, 1917, an order was passed by the board of aldermen adjudging that the abutting estates had received benefit and advantage from the laying out, and that said estates, among them the petitioner's lots, should be assessed certain amounts for the benefit. This order was presented to the mayor for his approval on August 10, 1917, but he did not approve it, and did not return it with his objections thereto within ten days thereafter.

Under the provisions of St. 1917, c. 344, Part III, § 1, betterments must be assessed within two years after the passage of the order of layout, in order to be valid. *Hitchcock v. Aldermen of Springfield*, 121 Mass. 382. In the present case the two-year

limitation began to run August 19, 1915, when the order of layout was approved by the mayor. *Quinn v. Cambridge*, 187 Mass. 507. If the order assessing betterments became fully effective on its passage by the board of aldermen (August 7, 1917), it came within the two years. But if the order was subject to the mayor's veto, it did not take effect until ten days after it was presented to him for approval (see *Doty v. Lyman*, 166 Mass. 318, 322), or on August 20, 1917, which is one day too late. Accordingly the case turns upon whether the order assessing the betterment was subject to the veto of the mayor. If it was not, the assessment is valid. If it was, the assessment is invalid, and the petitioner is entitled to a writ of certiorari. *Hitchcock v. Aldermen of Springfield*, *supra*.

Under the betterment act the board of city officers which is authorized to lay out ways therein is the body which is to determine whether any land receives a special benefit therefrom and the value of such benefit, and to assess upon the same a proportional share of the cost of the laying out. The charter of the city of Medford vests the government "in a single officer, to be called the mayor, and in a legislative body, to be called the board of aldermen," and in a school committee. St. 1903, c. 345, § 2. Section 21 of that charter, as amended by Spec. St. 1915, c. 160, provides that "The board of aldermen, with the approval of the mayor, shall have authority to order the laying out, altering, relocating, discontinuing and making specific repairs in all streets, ways and highways in the said city, and to assess all damages therefor." The words "with the approval of the mayor," were construed as meaning subject to the veto power of the mayor, when this court was considering a similar provision in the charter of the city of Waltham. *Doty v. Lyman*, 166 Mass. 318. It would seem to follow that as the power to lay out ways in Medford is in the board of aldermen subject to the veto power of the mayor, the body charged with the assessment of betterments under the provision of the betterment act above mentioned is likewise the board of aldermen, subject to the mayor's veto.

It is contended by the respondents that the words "with the approval of the mayor" were inserted in said § 21 in order to make the charter conform to R. L. c. 26, § 9, which provides that every order of a city council which involves the expenditure of money, or where concurrence of the board of aldermen and common

council may be necessary, shall be presented to the mayor for approval. But the charter expressly provides for that in § 52: "The general laws relating to the municipal indebtedness of cities, the general laws requiring the approval of the mayor to the doings of a city council or of either branch thereof, and relative to the exercise of the veto power by the mayor of a city . . . shall have full force, application and effect in said city."

This interpretation of the Medford charter, giving to the mayor the right to veto a betterment assessment, is confirmed by the history of the betterment act, and is in harmony with the trend of recent legislation increasing the powers of the mayor. See *Galligan v. Leonard*, 204 Mass. 202. Putting one side the statutes specially applicable to the city of Boston, the first betterment act applying to cities which accepted it was St. 1868, c. 75. At that time the power to lay out streets in most cities was in a city council of two branches, the "mayor and aldermen" and the "common council;" and to that city council was given the power to assess betterments. The mayor then was the presiding officer over the board of aldermen, with a casting vote but no veto. See *Day v. Aldermen of Springfield*, 102 Mass. 310. When the betterment laws were consolidated in 1871 (St. 1871, c. 382), and the mayor and aldermen were constituted the board to assess betterments, the mayor still had a vote in the board, but no veto power. It was in 1876 that a general law was passed conferring a veto power on the mayor and depriving him of the right to vote with the aldermen. St. 1876, c. 193, now R. L. c. 26, §§ 10, 11. And the anomaly of calling the aldermen "mayor and aldermen," when the mayor's right to vote as an alderman had been taken away from him, was ended by St. 1882, c. 164, providing that in all laws relating to cities the words "mayor and aldermen" should be construed to mean board of aldermen. But there was no indication that the veto power was to be taken from the mayor.

In some of the later charters the extent of the veto is defined and extensive. See charter of Cambridge, St. 1891, c. 364, § 11. In the more recent ones providing for a single board, the "aldermen" are generally given power to lay out streets, assess damages, and, except as otherwise provided, to act in matters relating to such layout subject to the approval of the mayor. This express power of veto seems to cover orders for betterment assessments.

See, for examples, Sts. 1893, c. 361 (Waltham); 1897, c. 172 (Woburn); 1898, c. 302, §§ 15, 17 (Gloucester); 1899, c. 162 (Melrose), c. 240, §§ 16, 17 (Somerville); 1900, c. 323, §§ 15, 17 (Gloucester), c. 427 (Northampton); 1914, c. 609 (Westfield), c. 680 (Attleborough), c. 687 (Revere). And in the general act for the revision of city charters, St. 1915, c. 267, plans A and B, which provide for a city government by a mayor and single legislative body, make every order of the council subject to the veto of the mayor. Part II, § 10; Part III, § 8.

In the light of this history and of the veto power given to him specifically under § 21 of the Medford charter, and generally under R. L. c. 26, § 9, we do not think that the Legislature intended in the betterment act to exclude the mayor's veto.

The result is that the writ of certiorari must issue; and it is
So ordered.

ELIZABETH RIDDELL, executrix, *vs.* SOPHIE V. FUHRMAN & others.

Suffolk. March 6, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, & PIERCE, JJ.

Alien Enemy. Probate Court, Jurisdiction, Motion in limine.

A petition was filed in February, 1916, in the Probate Court for the proof of the will of a woman who had died in this Commonwealth leaving as her next of kin a son and daughters domiciled in this Commonwealth and a daughter domiciled in Germany. All the next of kin appeared by attorneys more than a year previous to the recognition of a state of war existing between the United States of America and the Imperial German Government, and, after a hearing, a decree was entered allowing the will, from which some of the next of kin, including the daughter in Germany, appealed by their attorneys after the recognition of the state of war. While the appeal was pending in the Supreme Judicial Court a different attorney at law, representing the daughter in Germany, filed a motion *in limine* praying that the litigation as to the validity of the will should be suspended until the cessation of hostilities between the United States and the Imperial German Government. The motion was denied. *Held*, that the denial of the motion was proper, and was not contrary to the provisions of the "Act to define, regulate and punish trading with the enemy, and for other purposes," U. S. St. 1917, c. 106, nor to any provision of the Hague Convention of 1907, nor to the general principles of the common law.

The inhibition against the appearance of alien enemies in courts of this Commonwealth does not prevent them from being parties defendant or respondent.

APPEAL from a decree of the Probate Court for the county of Suffolk allowing the will of Catharine Crass, late of Boston.

A motion *in limine*, described in the opinion, was heard by Carroll, J., and by his order an interlocutory decree was entered denying it, from which an appeal was taken. Thereafter a final decree was entered affirming the decree of the Probate Court and remanding the case to that court for further proceedings.

E. M. Shanley, for the respondent Susanna Merkel.

G. M. Heathcote, (H. M. Bridey with him,) for the petitioner.

RUGG, C. J. This is a petition filed on the eleventh day of February, 1916, for the proof and allowance of the will of Catharine Crass, late of Boston, who died on the thirty-first of January, 1916. The petitioner is alleged to be a resident of Cambridge in our county of Middlesex. It is averred in the petition that Susanna Merkel, resident in Ossenheim, Germany, is a daughter who, with a son and four other daughters of the deceased, all resident within this Commonwealth, constituted her heirs at law and next of kin. It was agreed at the argument that the case had proceeded and should be considered on the footing that on the fifteenth of April, 1916, appearance was entered in the Probate Court by an attorney at law for Susanna Merkel and at least one of her sisters, and that on the first of June, 1916, another attorney at law entered his appearance in the Probate Court for Susanna Merkel and two of her sisters as respondents to the petition. A decree was entered by the Probate Court on the twenty-eighth of May, 1918, allowing the will, from which appeal was taken and entered in the Supreme Judicial Court for Suffolk County by Mr. Norton as attorney for Susanna Merkel and two of her sisters. On October 29, 1918, a motion *in limine* was filed by another attorney at law, setting out that Susanna Merkel "is a resident of Hessen, Germany, and a subject of the Imperial German Government and domiciled therein," that a state of war has existed between the United States and the "Imperial German Government" since April, 1917, "whereby the said Susanna Merkel became an alien enemy and unable to assert her rights or to be heard in the courts of this Commonwealth," and suggesting that "it is in derogation of the sovereignty and contrary to the law and comity of nations" that litigation touching the validity of the will should go forward, but that it ought to be suspended until the cessation

of hostilities. An interlocutory decree denied the motion and final decree established the will.

The record shows beyond peradventure that the Probate Court acquired complete jurisdiction of the cause and of all parties, including the non-resident heir at law, who subsequently became an enemy alien, before the time when the United States was a nation participating in the war. The sole question presented is whether as matter of law the state of war existing between the United States and Germany made imperative the continuance of the proceeding at bar for hearing until the suspension of hostilities.

It is provided by an act of Congress entitled "An Act to define, regulate and punish trading with the enemy, and for other purposes," approved on October 6, 1917, that "Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or an ally of an enemy prior to the end of the war . . . and provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him." U. S. St. 1917, c. 106, § 7 (b). If it be assumed in favor of the respondents, but without so deciding, that a petition for the proof and allowance of a will of a deceased citizen of this Commonwealth is a "suit or action at law or in equity," *Peters v. Peters*, 8 Cush. 529, and that the trading with the enemy act is binding upon the courts of this Commonwealth because enacted pursuant to the war powers of the federal government, *Selective Draft Law Cases*, 245 U. S. 866, it is plain that the words of that act not only do not prohibit the prosecution of this petition to a final decision, but expressly authorize the one of the respondents who is an alien enemy to appear and defend her rights through counsel. Manifestly there is nothing in that act which supports the motion *in limine*.

The question must be decided on general principles of the common law. Every practical consideration is against the allowance of the motion. It is of public concern that proceedings for the proof of wills of deceased residents of this Commonwealth, at the petition of those domiciled here, should go forward to a conclusion as speedily as possible. The creditors of the estate, the Commonwealth as possibly entitled to inheritance taxes, as well as heirs and legatees, all are interested in having determined as soon as

may be the validity of an instrument offered for proof as the last will and testament of a deceased resident.

The authorities are clear and unanimous, so far as we are aware, to the effect that the utmost extent of the inhibition against the appearance of alien enemies in courts is that they cannot be parties plaintiff. They are thus prohibited on the grounds shortly stated that our courts will give no assistance to proceedings which, if successful, would lead to the enrichment or profit of an alien enemy and hence be an aid and comfort to his country in the prosecution of its war; and also that one confessing himself hostile to our country and in a state of war with it cannot be heard if he sues in our courts to invoke in aid of his rights the benefit and protection of the laws of our nation, which in another field he is seeking to overthrow. As was said in *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.* [1916] 2 A. C. 307, 344, this is common with other rules against trading with the enemy "is a belligerent's weapon of self protection." It is at bottom a principle of public policy. Even that principle has been somewhat relaxed recently in England, where for the benefit of British subjects it seemed necessary to join with them as plaintiffs an alien enemy. *Rodriguez v. Speyer Brothers*, [1919] A. C. 59. This principle and the grounds upon which it rests fail utterly of application when the enemy alien is a defendant and not an active petitioner in our courts. Therefore it was said in *Watts, Watts & Co. Ltd. v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 21, "A suit may be brought in our courts against an alien enemy." That statement is rested on the authority of *McVeigh v. United States*, 11 Wall. 259, 267, and of *Dorsey v. Kyle*, 30 Md. 512, in both of which decisions the question was discussed and definitively settled. The matter was reviewed at length in a comprehensive and exhaustive judgment by Lord Chief Justice Reading, speaking for the court of appeal in *Porter v. Freudenberg*, [1915] 1 K. B. 857. The history of the common law on the subject there is treated fully, as well as in *Rodriguez v. Speyer Brothers*, [1919] A. C. 59. It would be superfluous to go over the older decisions in view of the complete analysis of them in these recent judgments. There is not a shred of authority to support the contention that in general an alien enemy cannot be a party defendant or respondent in our courts in time of war. This conclusion is in harmony with *Hutchinson v. Brock*,

11 Mass. 119, where an enemy alien was demandant in a writ of right and was therefore in the position of a party plaintiff.

It is plain that there is no reason for suspending proceedings for the proof of the will of a deceased resident of this Commonwealth because one of the heirs at law happens to be an alien enemy. In the case at bar the one now an enemy alien retained counsel a considerable time before the declaration of war. There is nothing on the record to indicate that her rights have not been adequately protected or that she has been denied the fullest opportunity to present evidence. No application for continuance was made on the ground of difficulty by reason of the war in securing evidence or witnesses. The implications from the nature of the proceeding are all against that idea. But it is enough to say that no such contention was raised at the hearing before the single justice. There is no room for the suggestions regarded as pertinent in *The Kaiser Wilhelm II*, 246 Fed. Rep. 786, and *Watts, Watts & Co. Ltd. v. Unione Austriaca Di Navigazione*, 248 U. S. 9, as reasons for continuance.

It has been argued that the Hague Convention of 1907 prohibits the prosecution of this petition until after the end of the war. In that connection reference is made to Section II, "Hostilities," Chapter I, "*Means of Injuring the Enemy, Sieges, and Bombardments*," Article 23 *h*, wherein "it is especially forbidden . . . To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." 36 U. S. Sts. at Large, Part II, "Treaties & Conventions," pages 2301, 2302. Treaties of the United States are the supreme law of the land. *Tellefsen v. Fee*, 168 Mass. 188. "International law is part of our law" and must be administered whenever involved in causes presented for determination. *The Paquete Habana*, 175 U. S. 677, 700. It has been held, after examination of its history and collocation, that this paragraph of the Hague Convention simply forbids "any declaration by the military commander of a belligerent force in the occupation of the enemy territory, which will prevent the inhabitants of that territory from using their Courts of law in order to assert or protect their civil rights." *Porter v. Freudenberg*, [1915] 1 K. B. 857, 878. However that may be, it is too plain for discussion that there is nothing in that paragraph which gives any color to the notion

that an enemy alien may not be held and treated as a respondent in a petition for the proof of the will of a deceased resident of this Commonwealth.

Decree affirmed.

NATIONAL SURETY COMPANY vs. MICHAEL B. NAZZARO.
MICHAEL B. NAZZARO vs. NATIONAL SURETY COMPANY.

Suffolk. March 6, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, What constitutes, Performance and breach. *Bail*. *Words*, "Bail," "Recognizance."

No action can be maintained by a surety company upon a contract in writing to indemnify it against loss which it might incur by reason or in consequence of having executed a bail bond to secure the release of one under arrest in Connecticut, if it appears that the bail bond, when presented to the clerk of the court in Connecticut, was refused by him and that the prisoner, instead of being released by reason of the bond, was released upon the personal recognizance of an officer of the surety company.

Difference between a bail bond and a recognizance pointed out.

TWO ACTIONS OF CONTRACT, the first action being upon an agreement in writing by the defendant to indemnify the plaintiff against loss arising from its becoming surety upon a bail bond for one Frank McKenna, under arrest in the State of Connecticut and charged with larceny. The second action was upon an account annexed for \$600, money deposited by the plaintiff with the defendant "in matter of bail bond of Frank McKenna." Writs dated, respectively, February 14 and February 20, 1917.

The provision of the indemnity contract material to the actions was as follows:

"Second: That the undersigned [Nazzaro] shall and will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees, which the Company shall or may at any time sustain or incur by reason or in consequence of having executed said instrument [the bail bond]; and that we will pay

over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which it or its representatives shall pay or cause to be paid or become liable to pay on account of having executed said instrument and on account of any damages, costs, charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees, which the company or its representatives may pay, or become liable to pay by reason of having executed said instrument, or in connection with any litigation, investigation or other matters growing out of or connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid out said sum or any part thereof or not."

In the Superior Court the cases were tried together before *McLaughlin, J.* The material evidence is described in the opinion. The judge refused requests by Nazzaro, made at the close of all the evidence, that a verdict be ordered for him in each action, and, at the request of the surety company, ordered a verdict for it in the first action in the sum of \$500, and for it as defendant in the second action. Nazzaro alleged exceptions.

J. E. Crowley, for Nazzaro.

J. E. McConnell, for the National Surety Company.

DE COURCY, J. These actions, based on an indemnity contract, arose out of the following transaction: Nazzaro applied at the Boston agency of the surety company to have it become surety on a bail bond to the State of Connecticut, in behalf of one Frank McKenna, who was under arrest in that State. He paid the premium, executed a contract of indemnity to protect the surety company against loss, and deposited with it as collateral security the sum of \$600. The agent gave to Nazzaro a letter introducing one Blume to Fitch D. Crandall, the company's agent at New London, the letter stating that Blume was to arrange "details with you [Crandall] in connection with the execution of a bail bond in behalf of Frank McKenna."

The New York office of the surety company forwarded to Crandall a bail bond for \$1,000, on which the company was surety. With Blume and an attorney employed by Blume as counsel for McKenna, Crandall went to the court house and presented the bail bond. The clerk of the court refused to accept it, but said he would accept the personal recognizance of Crandall. After some

telephone communication with the company's New York office, Crandall recognized for the prisoner's appearance at court; and later the company executed a bond to indemnify him. McKenna was afterwards defaulted, and Crandall's liability on the recognizance was discharged by the check of the surety company for \$1,000 paid to the prosecuting attorney.

The action of the National Surety Company was brought to recover the difference between the \$600 deposited by Nazzaro and the \$1,000 it paid in discharge of Crandall's liability, together with its counsel fees. Nazzaro seeks by his action to get back the \$600 deposited by him as collateral security.

The instrument on which the surety company seeks to prevail is a comprehensive, carefully framed indemnity contract under seal, presumably prepared by the company. It plainly contemplates the signing of a "bail bond" by the company, as surety. It recites, "Whereas, the Company signed and executed said bond as such surety upon condition of the execution and delivery hereof. . . ." Nazzaro's obligation is expressly confined to indemnifying and saving harmless the company from its liability "upon said instrument," or in connection therewith. As matter of fact the bail bond which the company signed was not accepted, and never became operative. The release of McKenna was not obtained on a bail bond but on a recognizance. And the surety on the recognizance was not the surety company but Fitch D. Crandall.

The words "recognizance" and "bail" when used in statutes are often construed as interchangeable; and, speaking generally, like rules of law are applicable to both these kinds of obligation. See *Commonwealth v. Gove*, 151 Mass. 392; *Lovejoy v. Isbell*, 70 Conn. 557; *In re Brown*, 35 Minn. 307; *Swan v. United States*, 3 Wyo. 150. Nevertheless a bail bond and a recognizance are intrinsically different. In criminal cases a bail bond is a contract under seal, executed by the accused, and from its nature requiring sureties or bail to whose custody he is committed. A recognizance is an obligation of record, entered into before some court or magistrate authorized to take it, with condition to do some particular act; and the prisoner is often allowed to obligate himself to answer to the charge. 6 C. J. 821, and notes. *Crane v. Keating*, 13 Pick. 339. *Commonwealth v. McNeill*, 19 Pick. 127. *Commonwealth v.*

Canada, 13 Pick. 86. *Warner v. Howard*, 121 Mass. 82. R. L. c. 217, §§ 65, 66, 77. St. 1912, c. 330. *People v. Kane*, 4 Denio, 530. *State v. Dorr*, 59 W. Va. 188. *State v. Wilson*, 175 S. W. Rep. 603. The rights and liabilities of the sureties in a bail bond and of sureties in a recognizance may be different. See *Merrill v. Prince*, 7 Mass. 396; *Johnson v. Randall*, 7 Mass. 340.

Without going further, we are of opinion that it could not be ruled as matter of law that by providing a recognizance to release McKenna the surety company had complied with its express obligation to execute a "bail bond," thereby entitling it to recover on Nazzaro's contract of indemnity. While apparently it is the practice in Massachusetts to use a recognizance, the law of Connecticut, where bail was to be given, was not introduced in evidence at the trial. See *Electric Welding Co. Ltd. v. Prince*, 200 Mass. 386. And as there was conflicting evidence as to Blume's powers, it was for the jury to say whether he was the agent of Nazzaro, and was authorized to bind him by substituting a recognizance for a bail bond, and another surety for the surety company. In *Bird v. Washburn*, 10 Pick. 223, on which the surety company relies, the obscure agreement was construed as intended to indemnify both or either of the plaintiffs, according to the contingent event that both or either should become bail.

It follows that Nazzaro's exception in each case to the direction of a verdict for the surety company must be sustained; and it is

So ordered

JAMES B. DOOLEY vs. MICHAEL F. McDONOUGH
& another.

Suffolk. March 7, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Contract, What constitutes. *Agency*, Existence of relation.

The owner of certain real estate authorized a broker to sell it for a certain sum. The broker showed it to one who offered to purchase it for a less sum and signed in duplicate a formal agreement in writing to that effect, delivering the papers to the broker, to whom he was to make an initial payment provided for in the

agreement if the broker could get the owner to sign the agreement. The broker procured the owner's signature, left one copy of the agreement with him and took the other to give to the purchaser. Before the broker reached the purchaser, he received a telephone message from him that he did not wish to go further with the transaction. At the trial in a municipal court of an action by the owner against the purchaser, the judge found that the agreement signed by the defendant was an offer by him to the plaintiff and that the defendant selected the broker as his agent to present the offer to the plaintiff and to receive his acceptance in writing; and found for the plaintiff. *Held*, that the findings were warranted by the evidence, and that the action might be maintained.

In the action above described, it *also was held* that, it not appearing that the payment of the initial instalment was a condition precedent to the making of the contract, a finding, that that instalment became payable when the plaintiff executed the agreement and delivered it to the broker as the defendant's agent, was warranted.

CONTRACT upon an agreement in writing for the purchase of real estate by the defendants. Writ in the Municipal Court of the City of Boston dated March 29, 1918.

The evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence, the defendants asked for rulings which, with the action of the judge therein, were as follows:

"1. On all the evidence, the plaintiff is not entitled to recover."
"Not given."

"2. If the conduct of the defendants in signing the alleged agreement be construed as an offer to be conveyed to the plaintiff, such offer was subject to withdrawal until accepted by the plaintiff."
"Given."

"3. If the conduct of the defendants is construed as an offer to be conveyed to the plaintiff through the agent of the plaintiff, in whose hands the property in question had been placed for sale, a withdrawal of the defendants' offer is effectual if communicated to such agent's office, before acceptance by the plaintiff, and received by one properly in charge of such office."
"Given."

"4. If the defendants' conduct in signing the alleged agreement is construed as an offer to be conveyed to the plaintiff, through the plaintiff's agent, and at the time of signing, a time was fixed for the passing of the initial deposit called for by said agreement, a withdrawal communicated to the defendants' agent, who had in hand the sale of the property, prior to the time fixed for passing said initial deposit, is effectual."
"Given."

"5. A suit brought for an initial deposit under a contract of

sale such as is alleged in this case, is premature if brought prior to the time fixed for the full performance of said contract." "Not given. Not sound. Not applicable."

"6. A suit brought for the initial deposit under a contract such as is alleged in this suit, cannot be maintained without showing the defendants' ability and willingness to carry out the full performance of said contract." "Not given. Not applicable to facts."

"7. If the initial deposit called for by the agreement alleged in this suit did not accompany the defendants' offer to be passed to the plaintiff upon his signing the same, such initial deposit was waived." "Not given. Contrary to fact found."

"8. A suit for the initial deposit under an agreement such as is alleged in this suit cannot be maintained until it has been shown what damages the defendants would suffer in the event of the plaintiff's refusal to carry out all of the terms of said contract." "Not given. Not sound in law."

"9. If the defendants' conduct in signing the alleged agreement is construed as an offer to be conveyed to the plaintiff, through the plaintiff's agent, a withdrawal communicated to the defendants' agent before the plaintiff's acceptance is communicated to the defendants, is effectual." "Given."

"10. The instrument, signed by the defendants, being in form a contract, calling for the signature of the plaintiff, no consideration is imported by the seal which prevents the defendants' withdrawing their offer before acceptance." "Not given."

"11. The instrument, signed by the defendants, is not under the facts shown in evidence, an irrevocable covenant under seal." "Given."

"12. If the initial deposit called for by the agreement alleged in this suit did not accompany the defendants' offer and was not demanded by the plaintiff at the time he signed the same, such initial deposit was waived." "Not given. Contrary to fact."

"13. If the plaintiff at the time he signed the alleged agreement did not waive the payment of the initial deposit, called for by said agreement, then his acceptance of the defendants' offer was not complete, but conditional." "Not given."

"14. The defendants in signing the alleged agreement under seal did not bind themselves to an irrevocable offer." "Given."

The judge found for the plaintiff in the sum of \$100, and, at

the request of the defendants, reported the case to the Appellate Division, who made an order dismissing the report. The defendants appealed.

J. D. Graham, for the defendants.

E. N. Carpenter, for the plaintiff.

DE COURCY, J. The defendants had been shown the plaintiff's house by one Fernandez, a real estate broker, who had been authorized by the plaintiff to sell it for \$4,000. On a subsequent Monday evening the broker called on the defendants and they made an offer of \$3,700 for the property, and signed in duplicate a formal written agreement to purchase at that price. The papers were delivered to Fernandez, and he was to receive the initial payment of \$100 on Tuesday evening if he could get the plaintiff to sign them.

Fernandez obtained the signature of the plaintiff to the agreements between nine and ten o'clock Tuesday forenoon, left one copy with him and took the other to deliver to the defendants. At some time that forenoon McDonough telephoned to the broker's office that he did not wish to go any further in the transaction; but Fernandez did not receive the message until the afternoon, some hours after he had procured the plaintiff's signature. The defendants later refused to take the agreement tendered to them, and this action was brought to recover the first payment of \$100. The judge of the Municipal Court found for the plaintiff, and his finding was sustained by the Appellate Division.

In view of the judge's general finding and his rulings on requests numbered 2 and 3, we must assume that he found, in effect, that the agreement was an offer proposed by the defendants, and that they selected Fernandez as their agent to take the offer to the plaintiff and receive his written acceptance. The facts stated in the report warrant the conclusion which the judge apparently reached, that when the defendants attempted to revoke their offer, it had been accepted, and that a binding contract had been completed in the manner intended by the parties. *Nickerson v. Bridges*, 216 Mass. 416, 420. *Brauer v. Shaw*, 168 Mass. 198. *Boston & Maine Railroad v. Bartlett*, 3 Cush. 224. See *Codman v. Deland*, 231 Mass. 344. There was also warrant for the finding that the instalment of \$100 was payable when the plaintiff executed the contract and delivered it to Fernandez, acting as the agent of the defendants for that purpose. It is not found that the payment

was a condition precedent to the completion of the contract. *Massachusetts Biographical Society v. Russell*, 229 Mass. 524.

No error appearing on the record, the entry must be
Order dismissing report affirmed.

REGINALD TUCKER *vs.* HALBERT G. STETSON.

Suffolk. March 7, 17, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Of physician and surgeon. *Physicians and Surgeons. Practices, Civil*, Judge's charge. *Evidence*, Presumptions and burden of proof.

At the trial of an action against a physician and surgeon for personal injuries alleged to have resulted from negligence of the defendant in treating the plaintiff, it appeared that in an accident the plaintiff had sustained a broken collar bone and a severe injury to a network of nerves around the shoulder called the brachial plexus. The defendant admitted that he so diagnosed the injury within a few days after it occurred. He treated the plaintiff at a hospital for three weeks and then directed him to go to another physician for another kind of treatment, but at no time advised an operation. The treatment was ineffectual and the plaintiff's arm began to wither. After six weeks of treatment, the plaintiff went to another hospital, where an operation was performed which was unsuccessful. There was conflicting testimony as to whether an operation, performed upon the plaintiff within a few days after the injury, probably would have restored the use of the arm or some of it. There also was evidence that ordinary surgeons in the locality where the defendant practised his profession had the skill necessary to perform the required operation. *Held*, that a verdict for the plaintiff was warranted.

In the action above described, it also was *held*, that the liability of the defendant was not to be determined by the jury upon consideration of contingent, speculative or possible results of an operation which might have been performed upon the plaintiff to remedy or mitigate the consequences of the injury to the nerves, but only upon proof by a fair preponderance of evidence that it was reasonably probable that such a result would follow an operation, performed by the defendant with the ordinary skill and ability of surgeons practising in localities similar to that where the defendant undertook to practise his profession.

Exceptions by the defendant to certain portions of the charge to the jury in the action above described were sustained because such portions of the charge violated the principle of law above stated.

TORT for personal injuries alleged to have resulted from negligence of the defendant, a physician and surgeon, in treating the plaintiff. Writ dated September 19, 1916.

In the Superior Court the action was tried before *White, J.*

The evidence, certain portions of the charge to the jury and the exceptions of the defendant are described in the opinion.

The jury found for the plaintiff in the sum of \$8,000; and the defendant alleged exceptions.

E. C. Stone, for the defendant, submitted a brief.

C. J. Martell, (*W. Flaherty* with him,) for the plaintiff.

PIERCE, J. In June, 1915, the plaintiff met with an accident while operating a motorcycle, which came into collision with a team that was coming around a curve on a cross road. He was taken to a hospital in Greenfield where he was treated by the defendant. As a result of this collision he sustained a broken collar bone and a severe injury to the set or network of nerves around the shoulder and neck called the brachial plexus, which resulted in a paralysis of his arm. He remained in the hospital three weeks, during which the defendant saw him every morning. During the time he was in the hospital his arm and shoulder were bandaged up. He could move his fingers a little but could not move his arm; and since that time he has never been able to make any other movement with the fingers or arm. At the end of three weeks he left the hospital at the defendant's suggestion. "The defendant directed him to go to see Dr. Hodskins . . . every day or so, the defendant telling him that he thought that his arm would come on all right in a couple of months or so." The plaintiff "went to Dr. Hodskins every other day or so" and had his arm rubbed with a liniment of some kind, and then put back in its bandage, the doctor telling him to massage it himself once or twice a day, which he did, but noticed no change in the feeling or sensation of his arm as he followed this course of treatment. After six weeks of treatment his arm began to wither up. He then went to the Massachusetts General Hospital and was operated upon unsuccessfully; the arm at the time of the trial was useless.

The claim of the plaintiff, as set out in the declaration, is "that the defendant carelessly and negligently failed to operate upon the injured parts of the plaintiff's body seasonably and that he failed to exercise that judgment which he professed to possess in the treatment of the plaintiff's injuries." At the close of the evidence the presiding judge refused to direct a verdict for the defendant, and the defendant excepted.

We think the ruling was right. The defendant is a physician and surgeon. He testified that he had been practising surgery since 1895; that in 1901 he had become an examining physician and surgeon for the important railroads in Greenfield; that he "had done some post-graduate work that was devoted to surgery;" that he "had had a large, wide and varied experience with almost every ordinary class of case, such as comes within the ordinary everyday work of a good surgeon;" that "he had been a busy man and was on the staff of the Franklin County Hospital;" that "he had never performed an operation to relieve any trouble with the brachial plexus, though he knew what it was and appreciated the effects of injury to it, and considered himself competent to pass upon whether the brachial plexus had been affected, and was satisfied in his own mind the following day after the accident that the plaintiff had trouble with the brachial plexus and treated him, keeping that fact in mind, so that the mere setting of the collar bone was not all he had in mind to do for the plaintiff;" and "that as compared to the injury to the brachial plexus, the collar bone was a simple and trivial part, and what . . . [he] was treating the plaintiff for as far as he was able was for the brachial plexus as well as for the broken arm." The testimony fully warranted the jury in finding that ordinary surgeons in the town where the defendant practised his profession had the skill and ability successfully to perform the surgical operation of "cutting into the nerves and suturing or sewing them together as far as possible in their normal position."

The conflicting testimony warranted a finding that such an operation upon the plaintiff, performed within a few days after the injury and before the nerves had lost their functional activity, probably in whole or in part would have restored the use of the arm. It also warranted a finding that the defendant did nothing for the plaintiff except to have a sand bag placed on his shoulder, have an x-ray taken, dress the arm with cotton bandages, and keep him in bed on his back during the ten days the plaintiff was at the hospital and until he was discharged, without advice that an operation was desirable or a suggestion that he could or should obtain the services of the best surgeons at the Massachusetts General Hospital. The foregoing facts if believed warranted a finding that the defendant was negligent in

failing to operate or in failing to advise the plaintiff seasonably to procure elsewhere surgical relief if the defendant felt himself incompetent to act.

We think there was prejudicial error in the charge when the presiding judge told the jury: "Now in sustaining the burden of proof upon a matter of this kind, the possibilities may first be dealt with. Was it possible for good results or better results to come from an operation? If it was not possible, why, then you will go no further with the case. Upon this Dr. Pierce says there were excellent probabilities, and the doctors on the other side say that they were dealing with a mere hope; Dr. Porter, who is or appears to be by the counsel on both sides the highest authority in Massachusetts upon this, tells you of his result in fifteen or eighteen cases upon which he has operated and that it is a mere hope; and Dr. Lothrop says — you have heard what he said. Whether there was any possibility, — the doctor says there was; and from the evidence of the other doctors it may be competent for you to find that so far as they are concerned that there was a possibility not of entirely remedying the condition of the nerves, but mitigating the consequences in some degree by an operation." As also in that part of the charge where the jury were instructed: "If after considering all the evidence in the case, the possibilities, the probabilities and the high degree of probabilities, you shall still say that you are left to a guess, of course you cannot found a verdict on a guess. The burden of proof, as I told you, is upon the plaintiff, and you can take these matters into consideration in saying whether he has proved his case."

The liability of the defendant was not to be determined by the jury upon consideration of contingent, speculative and possible results of an operation which might be performed upon the plaintiff to remedy or mitigate the consequence of the injury to the nerves, but upon proof by a fair preponderance of evidence that it was reasonably probable that such a result would follow an operation, performed by the defendant with the ordinary skill and ability of surgeons practising in towns similar to the one where the defendant undertook to practise his profession. *Small v. Howard*, 128 Mass. 131, 135.

Exceptions sustained.

MANUFACTURERS NATIONAL BANK vs. SIMON MANUFACTURING
COMPANY & others.

BENJAMIN GOLDSTEIN vs. SAME.

MASSACHUSETTS TRUST COMPANY vs. SAME.

Suffolk. March 21, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Master's report, Appeal. *Equity Jurisdiction*,
To reach and apply property fraudulently conveyed. *Fraud*, Against credi-
tors. *Wrongdoer without Remedy*.

Where in a suit in equity objections were filed to the report of a master but no exceptions founded on them were filed and the case came before this court on an appeal from a final decree, the evidence not being reported, it was pointed out that the findings of the master must be taken as true and that the only question was whether the final decree was warranted on the pleadings and the findings of the master.

In a suit in equity against a business corporation to reach and apply to the payment of a debt to the plaintiff property of the principal defendant conveyed to a new corporation in fraud of the creditors of the principal defendant, it was found by a master that a certain person was the president, treasurer and a director of the principal defendant and was the holder of all its capital stock except one share, and that under the by-laws and a vote of the directors this controlling officer and stockholder had control of the business and property of the principal defendant, that this controlling officer and stockholder, being in financial difficulties, by reason of which his individual property and that of the principal defendant were attached, in an attempt to put the property of the principal defendant out of the reach of the plaintiff and its other creditors, organized the new corporation, which took possession of the assets and plant of the principal defendant and continued in the same business in the same place, with the same machinery, fixtures and merchandise, without paying anything for such assets and without complying with St. 1903, c. 415, relating to sales of merchandise in bulk, and that the new corporation in order to maintain its credit paid the merchandise creditors of the principal defendant out of the accounts and notes receivable of that defendant. The master found in conclusion that the new corporation was nothing but the principal defendant operating under another name and that the conveyance and taking over of the assets of the principal defendant were a fraud on the creditors of that defendant. He also found that at the time of the hearing no property then in the possession of the new corporation could be positively identified as having belonged formerly to the principal defendant. The trial judge found that the transfer was a fraud on the creditors of the principal defendant, in which the new corporation participated, and that the new corporation was liable to the plaintiff, and also found

that, because of intentional fraud on the part of the new corporation, that corporation was not entitled as against the plaintiff to an allowance for amounts paid by it to the merchandise creditors of the principal defendant. *Held*, that on the facts found by the master the findings of the judge were warranted; that the transfer of the property and assets of the principal defendant was a fraud upon the creditors of the principal defendant; and accordingly that the property in the hands of the defendant new corporation could be applied in satisfaction of the debt of the principal defendant to the plaintiff creditor.

In the same case it was *held* that the defendant new corporation, having participated actively in the fraud, could not be relieved from the consequences of its fraudulent conduct, and therefore could not be allowed for the amounts that it had paid in satisfaction of the claims of the merchandise creditors of the principal defendant, such payments having been made in pursuance of a dishonest purpose to defraud the other creditors of the principal defendant and to maintain its own credit.

In a similar suit in equity brought by a trust company, which had discounted for the controlling officer and stockholder three notes of the principal defendant, it was contended by the defendant new corporation that it was not liable to the trust company because the proceeds of these notes were applied by such controlling officer and stockholder to his individual business. It was not found by the master that the proceeds were so applied; but it was *said*, that, if that fact had appeared and if it were assumed that that defence was open to the defendant new corporation, the plaintiff trust company still would have been entitled to recover the amount of these notes from the defendant new corporation, because the master found that "these notes . . . were all ordinary commercial paper, with nothing in their appearance or in the circumstances surrounding their execution and negotiation to put the trust company officials on inquiry, or cause them to believe or suspect that the [principal defendant] appeared thereon as an accommodation maker (as claimed), that the proceeds of these notes were being diverted from the corporation by [the controlling officer and stockholder] (if such was the fact), that he intended so to use them, or that his use of the name of the corporation in connection therewith as above was unauthorized."

In the same case it was *pointed out* that, the notes having been discounted by the trust company in good faith in the usual course of business at the request of the controlling officer and stockholder, acting in behalf of the principal defendant as its treasurer and in accordance with its by-laws, the circumstance that the proceeds of the notes were credited to his individual account, and the other facts found by the master, fell far short of a finding that the plaintiff trust company was to be charged with knowledge that the proceeds were applied to the individual business of the controlling officer and stockholder, and that the master was warranted in finding that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the principal defendant.

THREE BILLS IN EQUITY, filed in the Superior Court, the second on July 14, 1916, and the first and third on August 10, 1916, each by a creditor of the Simon Manufacturing Company, a corporation, under R. L. c. 159, § 3, cl. 8, to reach and apply assets of that corporation alleged to have been conveyed without consideration and in fraud of creditors to the Simon Coat Company, a

corporation caused to have been incorporated for the fraudulent purpose of receiving such assets.

The first and third cases were referred to a master, who made the findings that are stated in the opinion. The second case, of Goldstein, was heard by *Fox, J.*, who made a memorandum of decision containing the agreement of the parties, referred to in the opinion, that the question of fraudulent transfer from the Simon Manufacturing Company to the Simon Coat Company should be governed by the decision of the similar issue in the two other cases which had been referred to a master, and the proceedings were suspended for that purpose.

Later, no exceptions to the master's report having been filed, the cases were heard together by *Wait, J.*, on a motion for the entry of final decrees, and by order of the judge final decrees were entered for the respective plaintiffs against the defendant Simon Manufacturing Company and the defendant Simon Coat Company. Both of those defendants appealed in each of the three cases.

The cases were submitted on briefs.

S. Sigilman, for the defendants.

W. Hirsh, for the plaintiffs the Manufacturers National Bank and the Massachusetts Trust Company.

L. Marks, for the plaintiff Goldstein.

CROSBY, J. These are suits in equity by which the plaintiffs seek to reach and apply property alleged to have been conveyed by the Simon Manufacturing Company to the Simon Coat Company, in fraud of the creditors of the former. The first and third cases were referred to a master. The second case was heard by a judge of the Superior Court, who found that the Simon Manufacturing Company owed the plaintiff \$4,961.67. It was agreed by the parties in that suit that the question of the fraudulent transfer to the Simon Coat Company should be governed by the decision of a similar issue in the first and third suits. While objections to the master's report were severally filed by the defendants in the first and third suits, no exceptions to the report were filed, so that the only question is, are the final decrees warranted on the pleadings and findings of the master. *Whitworth v. Lowell*, 178 Mass. 43. *Huntress v. Allen*, 195 Mass. 226. *Lipsky v. Heller*, 199 Mass. 310.

The evidence not being reported, the facts found by the master

must be taken as true for the purposes of these cases. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37.

The master found that the Simon Manufacturing Company was organized in 1909, and thereafter engaged in the business of making sheepskin and leather-lined coats; that one Isaac Simon was the president, treasurer, a director and the principal stockholder of the company; that the capital stock of \$50,000 was divided into five hundred shares, of which Simon originally held four hundred and forty-nine and afterwards acquired fifty more, thereby owning all the stock except one share; that under the by-laws the treasurer was empowered to make notes, drafts, checks and other instruments on behalf of the company for any legitimate purpose to aid and prosecute the interests of the corporation; that by vote of the directors passed in 1911 the treasurer was empowered to purchase merchandise, to deposit the money, checks and securities of the company in some bank or trust company by him to be chosen, to borrow money on behalf of the corporation, and to sign checks, notes and drafts; that a similar vote was passed each year thereafter up to and including 1914.

He also found that in the spring of 1915 Simon (owing to certain real estate transactions) found himself in financial difficulties, by reason of which his individual property and that of the corporation were attached; that "In an attempt to relieve the situation, . . . and at the same time put the property of the Simon Manufacturing Company out of the reach of the plaintiff banks in case it should turn out that their claims against the Simon Manufacturing Company on the several notes . . . referred to in the bills of complaint were valid, Simon organized the defendant Simon Coat Company on October 4, 1915, . . . to succeed to the business of the Simon Manufacturing Company;" that "the new company simply took possession of the assets and plant of the old, and continued in the same business, in the same place, and with the same machinery, fixtures, and merchandise, as before; that for these assets the Simon Coat Company paid nothing; that according to an inventory prepared by Simon at the time the Simon Coat Company was formed they represented a total value of \$18,095.54;" that there was no compliance with St. 1903, c. 415, and the effect of the above transaction was to leave the Simon Manufacturing Company with no property which could be at-

tached or taken on execution in an action at law; that the company refused to produce its books at the hearing, although duly demanded, and their absence was not satisfactorily accounted for; and that the coat company in order to maintain its credit paid all the merchandise creditors of the manufacturing company out of the accounts and notes receivable of the latter.

The master found as a conclusion, from the evidence before him, that "The Simon Coat Company is nothing but the Simon Manufacturing Company operating under another name, and the conveyance to and the taking over by the Simon Coat Company of the assets of the Simon Manufacturing Company in the manner and under the circumstances hereinbefore described was a fraud on the creditors of the Simon Manufacturing Company;" and that "If material, there is no property now in the possession of the Simon Coat Company which can be positively identified as formerly belonging to the Simon Manufacturing Company."

A judge of the Superior Court upon a hearing for the entry of final decrees in the cases found, upon the facts found by the master, that the transfer to the Simon Coat Company amounted to a fraud upon the creditors of the manufacturing company, and that the coat company was liable to the plaintiffs; and that, because of active and intentional fraud on the part of the coat company, it was not entitled as against the plaintiffs to an allowance for amounts paid by it to the merchandise creditors of the manufacturing company.

We are of opinion that upon the facts found by the master a finding was well warranted that the transfer of the property and assets to the coat company was a fraud upon the creditors of the manufacturing company, and that the former is liable to these plaintiffs.

We are also of opinion that the facts found by the master warranted the further finding by the judge that the acts of the coat company were not merely a constructive fraud upon the creditors of the manufacturing company, but that they amounted to a positive, actual fraud in which the coat company participated. Under these circumstances the latter is not entitled to be allowed to deduct from the assets received by it the amounts paid to the merchandise creditors. The coat company, having entered into an unlawful scheme to delay and defraud the creditors of the manu-

facturing company in the collection of its debts, a court of equity will not relieve it from the consequences of its fraudulent conduct. *Wall v. Provident Institution for Savings*, 3 Allen, 96. *Lawton v. Estes*, 167 Mass. 181. *Fiske v. Fiske*, 173 Mass. 413. *Adams v. Young*, 200 Mass. 588, 592. Manifestly the amounts so paid to the merchandise creditors were so paid in pursuance of a dishonest purpose to defraud the other creditors of the Simon Manufacturing Company and to maintain the credit of the coat company; and, as the coat company actively participated in the fraud, it cannot be allowed for such payments. *Lynde v. McGregor*, 13 Allen, 172, 181. *Lamb v. McIntire*, 183 Mass. 367, 370. *Bolster v. Graves*, 189 Mass. 301, 307. *Kennedy v. Welch*, 196 Mass. 592, 595. *Rubenstein v. Lottow*, 220 Mass. 156, 169. *Lobstein v. Lehn*, 120 Ill. 549. *Biggins v. Lambert*, 213 Ill. 625. *Musselman v. Kent*, 33 Ind. 452. *Blair v. Smith*, 114 Ind. 114. *Thompson v. Bickford*, 19 Minn. 17. *Allen v. Berry*, 50 Mo. 90. *Loos v. Wilkinson*, 113 N. Y. 485. *Jackson v. Ludeling*, 99 U. S. 513. *Pritchett v. Jones*, 87 Ala. 317. *McCaskey v. Graff*, 23 Penn. St. 321. *Sullivan v. Tinker*, 140 Penn. St. 35. *Gilbert v. Hoffman*, 2 Watts, 66. *Henderson v. Hunton*, 26 Gratt. 926. *Stovall v. Farmers & Merchants Bank of Memphis*, 8 Sm. & Marsh. 305.

It is the contention of the Simon Coat Company that it is not liable on the three notes discounted by the Massachusetts Trust Company, because the proceeds of those notes were applied by Isaac Simon to his individual business. We are unable to agree with this contention. In the first place it is not found by the master that the proceeds of the note were so applied; although, if that fact had appeared, and if it be assumed that that defence is open to this defendant, the plaintiff still would be entitled to recover in view of the finding of the master that "these notes . . . were all ordinary commercial paper, with nothing in their appearance or in the circumstances surrounding their execution and negotiation to put the trust company officials on inquiry, or cause them to believe or suspect that the Simon Manufacturing Company appeared thereon as an accommodation maker (as claimed), that the proceeds of these notes were being diverted from the corporation by Simon (if such was the fact), that he [Simon] intended so to use them, or that his use of the name of the corporation in connection therewith as above was unauthorized."

The notes were discounted by the bank in good faith in the usual course of business at the request of Simon, acting on behalf of the company as its treasurer and in accordance with its by-laws. The circumstance that the proceeds of the notes were credited to the individual account of Simon, and the other findings, fall far short of requiring a finding that this plaintiff is to be charged with knowledge that the proceeds were applied to Simon's individual business. In view of the findings of the master and of the other findings recited in the report, the master was warranted in the conclusion that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the manufacturing company. Under these circumstances the rights of this plaintiff would not be affected if Simon, after receiving the proceeds of the notes, fraudulently appropriated them to his own use. *Innerarity v. Merchants' National Bank*, 139 Mass. 332, 333. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268. *Indian Head National Bank v. Clark*, 166 Mass. 27. *Fillebrown v. Hayward*, 190 Mass. 472. *Broadway National Bank of Chelsea v. Heffernan*, 220 Mass. 247.

The decree for the plaintiff in each case must be affirmed with costs.

So ordered.

FLORENCE A. BLAISDELL vs. HERSUM AND COMPANY,
INCORPORATED.

Middlesex. March 22, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Bailment. Conversion. Agency, Evidence of authority. Evidence, Of agency.

A bailee of chattels, who delivers the chattels to a person not authorized by the owner to receive them, is liable to the owner for a conversion of the goods, whether he was negligent or not.

In an action by the owner of furniture against the proprietor of a warehouse in which the furniture was stored for a conversion of a part of the goods, there was evidence that the plaintiff instructed an auctioneer, to whom she was referred by the defendant, to obtain from the defendant certain specific articles of her furniture, and that the auctioneer obtained from the defendant all the plaintiff's goods stored there and sold them. *Held*, that the plaintiff was entitled to go to

the jury, because the auctioneer was a special agent with limited authority and the defendant, before delivering all the plaintiff's goods to him, was bound to ascertain the nature and extent of his authority.

In the case above described it also was *held* that the acts and declarations of the auctioneer plainly were incompetent to prove his authority or the extent of it.

TORT for the alleged conversion of certain furniture belonging to the plaintiff and stored with the defendant. Writ in the Third District Court of Eastern Middlesex dated February 16, 1916.

On appeal to the Superior Court the case was tried before *Hitchcock, J.* The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to give four instructions to the jury. The judge gave the first instruction requested. The others were as follows:

"2. If the jury find that the plaintiff employed the witness Hines to sell for her certain articles of furniture stored with the defendant, Hersum and Company [Incorporated], and told Hines to obtain from the defendant, Hersum and Company, the said articles of furniture, and if Hines in the course of his employment, and in undertaking to carry out what he was employed to do, through negligence, error or mistake, informed the defendant, Hersum and Company, that he, Hines, was instructed by the plaintiff to obtain and to sell all the goods belonging to the plaintiff stored with the defendant, Hersum and Company, and requested the defendant to deliver said goods to Hines, and if the defendant, relying on said statement and believing that Hines had been instructed by the plaintiff to obtain and sell all her goods stored with the defendant, Hersum and Company, delivers the goods so stored to Hines, the defendant by so doing is not liable for the conversion of said goods or any of them, and the plaintiff cannot recover in this action.

"3. If the jury find that there was an agreement between the plaintiff and the witness Hines whereby Hines was employed by the plaintiff to obtain and sell certain articles of household furniture belonging to the plaintiff and stored with the defendant, Hersum and Company, and if Hines in the performance of said agreement and in undertaking to perform the acts for which he was employed, through negligence, error or mistake, informed the defendant, Hersum and Company, that he had been authorized by the plaintiff to obtain from the defendant and to sell all the

furniture and goods stored by the plaintiff with the defendant, Hersum and Company, and if the defendant, relying on such information and believing the same to be true, delivers all the said furniture and goods so stored to Hines, the delivery of said furniture and goods to Hines is in law a delivery of said furniture and goods to the plaintiff, and the plaintiff is bound by the act of Hines in so obtaining all said furniture and goods and she cannot maintain this action for the conversion of said furniture and goods, or any of it, so delivered by the defendant to Hines.

"4. If the jury find that the plaintiff employed the witness Hines to sell for her certain articles of household furniture belonging to her which she had stored with the defendant and instructed Hines to obtain said articles from the defendant but did not instruct Hines to obtain or sell for her certain other articles of household furniture and goods stored by her with the defendant, and if the jury further find that Hines, in the course of his employment and in undertaking to carry out what he was employed to do, requested the defendant to deliver to him not only the certain articles which he was instructed by the plaintiff to obtain and sell but all other household furniture and goods stored by the plaintiff with the defendant, and if the jury further find that the defendant did not know that the plaintiff had not instructed Hines to obtain and sell for her all the household furniture and goods stored by the plaintiff with the defendant but that the defendant was informed by said Hines that he, Hines, was so instructed by the plaintiff, and if the defendant relied on the statement of Hines that he, Hines, was instructed by the plaintiff to obtain and sell for the plaintiff all the household furniture and goods stored by the plaintiff with the defendant (if such statement is found to have been made by said Hines to the defendant), and if the defendant did not know that said statement was untrue and did not have any knowledge or notice of any facts or circumstances from which a reasonably prudent man, under the circumstances could fairly and reasonably infer that said statement was untrue, then the defendant in delivering to Hines all the household furniture and goods stored by the plaintiff with the defendant in accordance with Hines' request is not liable to the plaintiff for the conversion of said household furniture and goods or any of it, and the plaintiff cannot recover in this action."

The judge refused to give any of these instructions, and submitted the case to the jury with other instructions. The jury returned a verdict for the plaintiff in the sum of \$650; and the defendant alleged exceptions.

The case was submitted on briefs.

H. F. R. Dolan, J. H. Morson & J. S. O'Neill, for the defendant.

T. A. Glennon, for the plaintiff.

CROSBY, J. This is an action to recover for the alleged conversion by the defendant of certain household goods which had been delivered to it by the plaintiff to be stored in its warehouse.

The plaintiff testified that, while the goods were stored in the defendant's warehouse, she stated to the defendant's treasurer and general manager, one Hersum, that she would like to dispose of a sideboard so stored and asked him if he knew of any one who could sell it for her; that he referred her to one Hines who conducted a second-hand furniture and auction room; that later, she instructed Hines to obtain from the defendant certain specific articles named by her and sell them; that afterwards, she learned that Hines had taken all her goods which she had stored with the defendant, and had sold them.

Hines testified that the plaintiff told him she wanted the furniture stored with the defendant sold; and that she did not enumerate any particular articles.

Hersum testified that Hines told him the plaintiff had instructed him (Hines) to obtain all her goods stored with the defendant and sell them; and that thereupon the defendant sent all the goods to Hines.

The evidence discloses that Hines was a special agent of the plaintiff, with limited authority. The defendant before delivering all the plaintiff's goods to Hines was bound to inquire and ascertain the nature and extent of his authority. *Lovett, Hart & Phipps Co. v. Sullivan*, 189 Mass. 535. *A. Blum Jr's Sons v. Whipple*, 194 Mass. 253, 257. The acts and declarations of Hines were plainly incompetent to prove his authority or its extent. *Manning v. Carberry*, 172 Mass. 432. *Baldwin v. Connecticut Mutual Life Ins. Co.* 182 Mass. 389.

The defendant's second, third and fourth requests in substance were that, if Hines was employed by the plaintiff to sell certain articles which she directed him to obtain from the defendant

but by negligence or mistake Hines informed the defendant that he was employed by the plaintiff to obtain and sell all the goods, the defendant is not liable. These requests properly could not have been given. The defendant as a bailee of the plaintiff's property impliedly contracted to return it to her, or to some third person with her express or implied consent. *Doyle v. Peerless Motor Car Co. of New England*, 226 Mass. 561.

Delivery of property by a bailee to a person not authorized by the owner is of itself a conversion, rendering the bailee liable without regard to the question of due care or negligence. *Hall v. Boston & Worcester Railroad*, 14 Allen, 439, 443. *Murray v. Postal Telegraph-Cable Co.* 210 Mass. 188, 195. *Stevens v. Stewart-Warner Speedometer Corp.* 223 Mass. 44.

The well settled principle that a master is liable for the negligence of his servant committed while engaged in his master's business, and within the scope of his employment, is not applicable to the facts in the case at bar; accordingly, *Howe v. Newmarch*, 12 Allen, 49, and similar cases cited and relied on by the defendant, are not authorities in favor of its contention that the rulings requested should have been given. The instructions given were correct and fully protected the rights of the defendant.

Exceptions overruled.

CHRISTINE MCALLER, administratrix, vs. EGDAR L. GILLET
& others, executors.

Hampden. March 22, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Employer's liability, In operating pile driver, Res ipsa loquitur.

In an action at common law by an administrator against the employer of the plaintiff's intestate for personal injuries of the plaintiff's intestate sustained before the provisions of the workmen's compensation act relating to liability took effect, there was evidence that the plaintiff's intestate was set at work in the operation of a pile driver in a pond of water ten or twelve feet deep, the intestate standing on a plank that was laid across two pieces of timber which extended forward on either side of the pile driver, that it was the duty of the intestate to guide a follower,

which was a piece of timber with a spike on the end of it that fitted into a hole in the top of each pile, while the hammer striking the follower drove the pile to the required depth, that a pile had been driven, and that then "they started to pull up the follower and it came up suddenly without any warning to him with a jerk and that it jumped up on the upper end and struck a cross piece that was across the front part of the pile driver frame," and, "when it struck that, the foot of it bounded outward and struck the plank on which [the intestate] was standing, knocking it out from under his feet and knocking him over in a somersault shape so that he fell head first, and came in contact with the pile striking the right side of his head." It did not appear that the follower ever before came up "with a jerk," and there was nothing to explain why it jumped out at this time, and there was no evidence that the construction or arrangement of the derrick that hoisted the follower was such that the employer had any reason to apprehend such an occurrence as resulted in the intestate's injuries. *Held*, that there was no evidence of negligence on the part of the defendant employer. In the case above described it also was *held* that this court could not say that the accident was one which in the ordinary experience of mankind would not have happened without negligence on the part of the employer or of one for whose negligence he was responsible, and consequently that the doctrine of *res ipsa loquitur* had no application.

TORT at common law by the administratrix of Archibald McAller, late of New Haven in the State of Connecticut, against the executors of the will of Ralph D. Gillett, late of Westfield, the employer of the intestate, who carried on business under the name of the Woronoco Construction Company, for conscious suffering of the plaintiff's intestate caused by personal injuries sustained by him on May 15, 1912, while in the employ of the defendants' testator, from which he died on September 18, 1912. Writ dated November 2, 1915.

The workmen's compensation act, excepting Part IV, relating to the Massachusetts Employees Insurance Association, and Part III, §§ 1, 2, 3, relating to the Industrial Accident Board, took effect on July 1, 1912. See St. 1911, c. 751, Part V, § 6, as amended by St. 1912, c. 571, § 19.

In the Superior Court the case was tried before *Callahan, J.* The facts most favorable to the plaintiff which could have been found upon the evidence are stated in the opinion. At the close of the plaintiff's evidence, the defendants filed a motion that a verdict be ordered for the defendants. The judge granted the motion and ordered a verdict for the defendants, and reported the case for determination by this court. If the ordering of the verdict for the defendants was correct, the verdict was to stand; otherwise, there was to be a new trial.

The case was submitted on briefs.

R. A. Bidwell, for the plaintiff.

A. L. Green & F. F. Bennett, for the defendants.

DE COURCY, J. The plaintiff's intestate, Archibald McAller, was injured while working on a pile driver. The only evidence introduced at the trial was that of declarations made by McAller to his family and attorney, between the time of his injury in May, 1912, and his death in the following September. The description of the apparatus and the story of the accident are meagre and incomplete. In its aspect most favorable to the plaintiff the testimony tends to show the following facts:

A pile driver had been set up over a pond of water ten or twelve feet deep, in order to drive piles for the foundation of a railroad bridge. There were two pieces of timber, one each side of, and at right angles with the face of, the pile driver; and on these, "across the front," was laid a plank on which the intestate was set at work by Gillett, the defendants' testate. When a pile was driven as far as the hammer could drive it, a "follower" was used. This was a piece of timber about six feet long, on the bottom of which was a pintle or bolt, an inch in diameter and about five inches long. This bolt was dropped into a hole in the top of the pile, in order to keep the follower in its place while it was being used to drive with. When the pile was driven to the required depth a rope was attached to the follower, and it was pulled up.

It was the duty of McAller to guide the follower so that the bolt would feed into the hole in the top of the pile, and also to steady it there until the hammer drove the pile down so that "the earth or whatever came round the follower would keep it steady itself." It does not appear who fastened on the rope, or what McAller's duties were while the follower was being hoisted.

The intestate had been at work some hours when the accident happened. Presumably the pile driver was shifted after each pile was driven; and at the same time some one must have moved the plank on which he stood when at work. According to McAller's statement, as testified to by his attorney, a pile had been driven; then, "they started to pull up the follower and it came up suddenly without any warning to him with a jerk and that it jumped

up on the upper end and struck a cross piece that was across the front part of the pile driver frame. When it struck that, the foot of it bounded outward and struck the plank on which McAller was standing, knocking it out from under his feet and knocking him over in a somersault shape so that he fell head first, and came in contact with the pile striking the right side of his head."

Assuming that there was evidence for the jury that the plaintiff's intestate used due care, and did not assume the risk, this meagre record discloses no negligence on the part of the defendants' testator. It does not appear that the follower ever before came up "with a jerk," which might operate as a notice to the employer. No explanation was offered as to why it jumped out at this time. There was no evidence that the construction or arrangement of the derrick was such that the employer should apprehend such a complicated occurrence, beginning with the traveller striking the "cross piece," tipping, and knocking the plank from under the intestate. In short the plaintiff failed to produce evidence which would warrant a jury in finding that the accident was due to either of the causes of action alleged in her declaration. *Ragolsky v. Nurenberg*, 211 Mass. 575.

In the absence of any proof that the movement of the follower was due to any defect or latent danger in the derrick or its appliances, the plaintiff invokes the doctrine of *res ipsa loquitur*. But we cannot say that the accident was one which in the ordinary experience of mankind would not have happened unless from negligence on the part of the employer, or that of others for whose negligence he was responsible. On the contrary, if we consider the inferences that properly might be drawn from the facts disclosed, the accident well may have been due to a careless starting of the engine, by applying the power suddenly and with too great force; or it is equally inferable that the rope was adjusted too far from the top of the follower, which would give it a tendency to tip outward when separated from the pile. These, and some other explanations that might be conjectured, would indicate that the accident was due to negligence on the part of a fellow servant of McAller, for which the employer would not be liable. In any event it is plain that the doctrine of *res ipsa loquitur* is not applicable to the facts disclosed. *Trim v. Fore River Ship Building*

Co. 211 Mass. 593. *Cullalucca v. Plymouth Rubber Co.* 217 Mass. 392.

The verdict for the defendants was ordered rightly; and in accordance with the report the entry must be

Verdict to stand.

PATRICK McKEON vs. FREDERICK L. BRIGGS.

Suffolk. March 31, 1919. — May 20, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Poor Debtor. Evidence, Judicial record, Presumptions and burden of proof.
Waiver.

In an action against the surety on a poor debtor's recognizance for an alleged breach of the recognizance by the debtor in failing to deliver himself up for examination within thirty days from the day of his arrest, an application in writing to take the oath for the relief of poor debtors purporting to be signed in behalf of the debtor, which is no part of the record, offered in evidence by the plaintiff, must be excluded.

In an action against the surety on a poor debtor's recognizance, where the record in the poor debtor proceedings shows that the debtor delivered himself up for examination in accordance with R. L. c. 168, § 30, on a day within thirty days from the day of his arrest, and gave notice of his desire to take the oath for the relief of poor debtors, this record is conclusive and binding upon the parties and cannot be contradicted or controlled by extrinsic evidence.

Accordingly in such an action, where the record of the poor debtor proceedings shows that the debtor on a certain day within thirty days from the day of his arrest personally appeared in court and made the application to take the oath, the plaintiff cannot be permitted to testify that the debtor told him that he never had been in the poor debtor session before the day finally fixed for the hearing, which was a month and a half later than the day of his application.

In an action against the surety on a poor debtor's recognizance the burden is on the plaintiff to show that there has been a breach of the recognizance, under which the debtor agreed to deliver himself up for examination within thirty days from the date of his arrest and abide the order of the court.

A poor debtor in surrendering himself and making his application need not be in the actual presence of the magistrate, if the court is in session and the magistrate is at hand and is readily accessible for the transaction of such business as properly may be presented to him. In the present case it was held that the fact, that when the debtor appeared and made the application to take the oath the magistrate was not in the court room but was in the lobby adjoining and did not see him personally, was immaterial.

In an action against the surety on a poor debtor's recognizance where the evidence showed that the magistrate was present when the debtor appeared in court

within thirty days from his arrest and made application to take the oath and that on the day finally fixed for the hearing the debtor and the creditor, with counsel, were all present in court at the appointed time and that the creditor had ample opportunity to examine the debtor but declined to do so and left the court room with his counsel, it was *said* that it was unnecessary to determine whether the creditor's counsel by his appearances at the hearings and other acts, without raising any objection to the regularity of the proceedings, had waived the right to object to any failure of the debtor properly to surrender himself for examination or to any want of jurisdiction in the court over the person of the debtor, because as matter of law the evidence did not warrant a finding that there had been any breach of the recognizance.

CONTRACT against the surety on the recognizance of George W. Choate, a poor debtor, who had been arrested on an execution in favor of the plaintiff, for an alleged breach of the recognizance in the failure of the debtor to deliver himself up for examination within thirty days from the day of his arrest. Writ dated May 10, 1917.

In the Superior Court the case was tried before *King, J.* The evidence and the defendant's exceptions to the admission of certain evidence are described in the opinion. At the close of the evidence the defendant filed a motion asking the judge to order a verdict for the defendant. The judge denied the motion. The defendant also asked the judge to make, among others, the following rulings:

"4. The appearance of the creditor's attorney on the return day of the order of notice, and without questioning any alleged defects or the jurisdiction of the court or announcing any intention to object either to the notice or the surrender of the debtor or otherwise, was a waiver of any defect, if any there was, to the jurisdiction of the court, or any failure, if any there was, on the part of the debtor to sufficiently surrender himself.

"5. The payment of the fee of \$3 by the creditor or the creditor's attorney to the clerk of the poor debtor session of the Municipal Court of the City of Boston on the day before the return day of the notice, and the appearance of the creditor's attorney generally in the case, was a waiver of any defect, if any there was, to the jurisdiction of the court or any failure, if any there was, on the part of the debtor to properly surrender himself for examination.

"6. The attendance of both the debtor and creditor's attorney on the return day of the notice, and the payment of the fees by creditor's attorney, and the general appearance of creditor's attor-

ney and agreement for a continuance was a waiver of any and all defects there might have been at that time.

"7. The continuance of the case on the debtor's application to take the oath for the relief of poor debtors, with the assent of the creditor's attorney, was a waiver of any defects, if any there were, in the prior proceedings and the jurisdiction of the court."

The judge refused to make any of these rulings and left to the jury the questions whether there had been a breach of the recognizance and whether there had been any waiver on the part of the plaintiff. The jury found for the plaintiff in the penal sum of the recognizance, \$1,500; and the defendant alleged exceptions.

The case was submitted on briefs.

C. F. Eldredge, for the defendant.

E. M. Shanley, for the plaintiff.

CROSBY, J. This is an action against the surety on a poor debtor recognizance. The breach relied on is that the debtor did not deliver himself up for examination within thirty days from the day of his arrest.

The debtor, one George W. Choate, was arrested on an execution on January 9, 1917, and entered into a recognizance under R. L. c. 168, § 30. There was evidence that on February 6, 1917, he appeared with his surety in the poor debtor's session of the Municipal Court of the City of Boston, delivered himself up for examination, and made application to take the oath for the relief of poor debtors. An order of notice issued thereon to the judgment creditor, returnable February 27, 1917, at nine o'clock in the forenoon. The notice required the judgment creditor to "pay to the clerk the fee of three dollars for these proceedings forthwith."

The record of the court was introduced in evidence and contained the following recital: "Patrick McKeon vs. George W. Choate. Fee not paid. Attorney for creditor, E. M. Shanley. Attorney for debtor, C. F. Eldredge and Harold Caverly. February 6, 1917, notice of debtor's desire to take the oath for the relief of poor debtors issues, returnable February 27, 1917, 9 A. M. February 24, 1917, notice returned with service."

The plaintiff offered in evidence, subject to the exception of the defendant, a written application to take the oath, signed "Harold Caverly on behalf of George W. Choate." It was no part

of the record in the case, and should have been excluded. The exception to its admission must be sustained.

The record of the court, correctly construed, shows that the debtor on February 6, 1917, delivered himself up for examination in accordance with the statute (R. L. c. 168, § 30), and gave notice of his desire to take the oath for the relief of poor debtors. That the record cannot be contradicted or controlled by extrinsic evidence, but is conclusive and binding upon the parties, is well settled. *Niles v. Silverman*, 216 Mass. 242. *Haskell v. Cunningham*, 221 Mass. 49, 53.

It was decided in *Howard v. Roach*, 226 Mass. 80, that when the application is made the debtor must appear personally, not merely by attorney, within thirty days of his arrest, in order to comply with the condition of the recognizance; in that case counsel for the debtor appeared and made application to take the oath in the absence of the debtor, while in the case at bar the debtor himself appeared in court and personally made the application. As the evidence that the debtor was present in court on February 6 was conclusively established by the record, the testimony of the plaintiff to the effect that the debtor told him he had never been in the poor debtor session before March 20, was inadmissible, and the exception thereto must be sustained.

According to the docket entries, the notice was served on the creditor's attorney on February 9, 1917, the fee was paid by the creditor on February 26, 1917, on February 27, 1917, at the time and place fixed, the creditor's attorney and the debtor appeared, and the hearing was continued by order of the court to March 20, 1917, at nine o'clock in the forenoon. The court record also contains the following recital: "March 20, 1917, debtor sworn. Examination ordered to proceed. Justice Burke. March 20, 1917, 10:27 A. M., debtor appears; creditor does not appear. Burke, Justice."

The undisputed evidence shows that the creditor and his counsel and the debtor and his counsel were present in the poor debtor's court on February 27, 1917. The plaintiff testified as follows: "I was there the second time, March 20, 1917, to which time the case had been continued. Mr. Shanley was there; Mr. Choate was there and his counsel. That is the day the court ordered the examination to go forward. Then later Mr. Shanley, my counsel,

and I went out, and left Mr. Choate and his counsel there." The burden was on the plaintiff to show that there had been a breach of the recognizance, under which the debtor agreed to deliver himself up for examination within thirty days from the date of his arrest and abide the order of the court.

If the oral evidence to show that the debtor was present in court on that day was not believed by the jury, still there was no competent evidence introduced to the effect he was not there. It follows that the plaintiff has wholly failed to prove a breach of the recognizance. The testimony of the plaintiff, admitted subject to the exception of the defendant, that the debtor told him that he (the debtor) had never been in the poor debtor court before March 20, 1917, was not admissible to establish that he was not present in court on February 6, 1917, because the record is conclusive upon that question; accordingly we need not consider whether under other circumstances the evidence would have been admissible. *Simmons v. Poole*, 227 Mass. 29, 36. *Haney v. Donnelly*, 12 Gray, 361.

The circumstance that, when the debtor went to the poor debtor session of the court with his counsel to deliver himself up for examination and to make the application to take the oath, the magistrate was not in the court room but was in the lobby adjoining and did not personally see him, is immaterial. It is undisputed that during the month of February, 1917, the court was in session daily from nine o'clock in the forenoon until four o'clock in the afternoon; it was open during that time for the transaction of business, and the judge was at all times available. The debtor in surrendering himself and making his application need not be in the actual presence of the magistrate; it is sufficient if the latter is at hand and is readily accessible for the transaction of such business as properly may be presented to him. See *Simon v. Justices of Municipal Court*, 224 Mass. 122.

The statute is complied with if the debtor within thirty days delivers himself up for examination before a magistrate qualified to act. *Howard v. Roach*, *supra*. The uncontradicted evidence shows that such a magistrate was present when the debtor appeared in court and made application to take the oath on February 6, 1917; and also, that on March 20, 1917, the day finally fixed for the hearing, the debtor and the creditor, with counsel,

were all present in court at the appointed time and that the creditor had ample opportunity to examine the debtor, but declined to do so and left the court room with his counsel.

We need not determine whether the appearance by the creditor's counsel on the return day fixed for the examination, his subsequent appearance at the hearing on March 20, 1917, and the payment by him on February 26 of the required fee, without raising any objection whatever to the regularity of the proceedings, operated as a waiver of any failure of the debtor properly to surrender himself for examination, or of any want of jurisdiction in the court, over the person, because we are of opinion that as matter of law the evidence did not warrant a finding that there had been a breach of the recognizance. See *McInerny v. Samuels*, 125 Mass. 425; *Sturman v. McCarthy*, 232 Mass. 44.

The defendant's request, that the judge order a verdict for the defendant on the ground that on all the evidence the plaintiff was not entitled to recover, should have been given, the exception to the refusal of the judge so to do is sustained, and judgment is to be entered for the defendant under St. 1909, c. 236.

So ordered.

SALVATORE AMODIO'S CASE.

Hampden. May 19, 1919. — May 20, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act, Findings of Industrial Accident Board.

In a claim under the workmen's compensation act, a decision of the Industrial Accident Board upon a question of fact is final and cannot be reversed if there was any evidence to support it. Following *Pass's Case*, 232 Mass. 515, and the cases there cited.

APPEAL to the Superior Court under the workmen's compensation act from a decision of the Industrial Accident Board refusing additional compensation to Salvatore Amodio, employed as a quarryman by John S. Lane and Son of Westfield, who was injured in the course of his employment on June 30, 1914, and was

awarded compensation by a decision of the board made on May 17, 1915.

The case was heard by *King, J.*, who made a decree in accordance with the decision of the Industrial Accident Board, ordering that the employee's claim for further compensation be dismissed. The employee appealed.

The case was submitted on briefs.

S. Martinelli, for the employee.

T. H. Calhoun & E. J. Sullivan, for the insurer.

BY THE COURT. This case comes before us by appeal from a decree of the Superior Court affirming a decision of the Industrial Accident Board, which in turn adopted and confirmed the finding of the single member. The record presents no question of law whatever. Whether the employee was entitled to a finding in his favor was wholly a matter of fact. On a matter of fact the conclusion of the Industrial Accident Board is final and cannot be reversed unless quite unsupported by evidence. There is no ground for disturbing their finding in the case at bar, which is covered in every particular by *Pass's Case*, 232 Mass. 515, and the decisions there collected.

Decree affirmed.

JOHN GONDEK *vs.* CUDAHY PACKING COMPANY.

JOSEPHINE GONDEK *vs.* SAME.

EDMOND GONDEK *vs.* SAME.

MARY GONDEK *vs.* SAME.

Middlesex. March 4, 1919. — May 21, 1919. ▲

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Motor Vehicle, Registration. Trespass. Corporation. Agency, Scope of employment. Nuisance. Practice, Civil, Exceptions. Waiver. Words, "Non-resident."

A corporation, which was incorporated under the laws of the State of Maine and which for more than thirty days has had several places of business in this Commonwealth and also one in New Hampshire and has executive offices in Boston but none in New Hampshire, does not come within the definition of "non-resident," given in St. 1914, c. 204, § 1, under the provisions of the statute

relating to registration of motor vehicles, which includes only "residents of States or countries who have no regular place of abode or business in this Commonwealth for a period of more than thirty days in the calendar year."

A motor vehicle of such a corporation, while being operated upon a public way in this Commonwealth without having been registered here, is an outlaw.

A corporation, which was incorporated in the State of Maine and had several places of business in this Commonwealth and a store in Nashua in the State of New Hampshire where a general meat packing business and the business of storing furs and furniture were conducted, permitted the general manager of the Nashua store to use for his own business and pleasure around Nashua a motor vehicle owned by it and duly registered in New Hampshire but not in this Commonwealth. Such general manager directed a subordinate in the corporation's employ to transport from Nashua to a city in this Commonwealth, in such a motor vehicle registered in New Hampshire but not in this Commonwealth, a gas stove which the general manager had stored for several months in the defendant's storehouse and had sold to his cousin in Lawrence. While on a public way in this Commonwealth, the operator of the motor vehicle negligently injured another traveller. In an action against the corporation for the injuries received, it was *held*, that a finding was not warranted that the motor vehicle was being operated on business of the corporation; and *also* that a finding was not warranted that the Nashua general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business.

The consequence of one permitting a nuisance, such as an unregistered motor vehicle operated upon a highway, is that he is responsible for injuries caused thereby even although such vehicle is at the moment when such injuries are caused being used in the business or pleasure of another. Per *Rugg, C. J.*

At the trial of the action above described, it appeared that the injury to the plaintiff occurred in June, 1918, and there was evidence tending to show that the motor vehicle was not registered in Massachusetts in the year 1917 and that during that year the general manager had used it five or six times to go from Nashua in New Hampshire to Lawrence in this Commonwealth to visit his family. There was no evidence warranting a finding that such trips were under circumstances likely to come to the defendant's attention, nor was there any evidence of any use of the motor vehicle in Massachusetts in 1918 previous to the injury to the plaintiff. *Held*, that a finding was not warranted that the defendant knew or ought to have known of the unlawful use of the motor vehicle in Massachusetts by its Nashua general manager for his own business or pleasure so that its acquiescence in such use on the occasion when the plaintiff was injured might be implied.

At the trial of the action above described, after both parties had rested and the judge had denied a motion by the defendant that a verdict be ordered in its favor and had refused to rule in substance that there was no evidence warranting a finding that the general manager had authority from the defendant to use the unregistered motor vehicle on his own business in Massachusetts, the defendant's attorney, in objecting to the form of a special question which the judge was propounding to the jury, stated that the defendant contended that the real question was whether the general manager had authority, or whether it was within the scope of his employment, to permit the use of the automobile on his own business, and whether that permission amounted to the consent of the

defendant, and further stated that he (the attorney) thought, that, if the manager had authority generally to use the automobile for his own business, it would follow that he would have authority to use it in Massachusetts as well as in Nashua for that purpose, and that he thought that was the real question at issue in the case and that whether or not the general manager had authority to permit the commission of an illegal act was not the issue from his point of view. The judge asked the defendant's counsel, "You would like to have added, 'Authority to operate the automobile upon business of'" the general manager? and the defendant's counsel replied, "Yes, and then whether it happened on the highways of Massachusetts or not I don't care." *Held*, that it could not be said that the remarks of the defendant's counsel, occurring after the denial of the defendant's motion and the refusal of its requests for rulings, constituted a waiver of the requests.

FOUR ACTIONS OF TORT, the first action being for personal injuries and the destruction of a horse and wagon alleged to have been caused by a collision between the horse and wagon and a motor vehicle driven by one Larivee, alleged to have been an employee of the defendant acting negligently and within the scope of his employment, and for consequential damages resulting from personal injuries to the wife of the plaintiff in that action, the plaintiff in the second action; and the other three actions being for personal injuries received in the same accident. Writs dated July 13, 1918.

In the Superior Court the actions were tried together before *Hitchcock, J.* The material evidence is described in the opinion.

At the close of the evidence the defendant moved that verdicts be ordered in its favor. These motions were denied. The defendant then asked for, and the judge refused to give, rulings of law, of which the following are material to the decision:

"1. On all the evidence the plaintiffs are not entitled to recover.

"2. On all the evidence the automobile of the defendant was not being used on the business of the defendant at the time of the accident.

"3. On all the evidence the automobile of the defendant was not being used with the permission of the defendant at the time of the accident.

"4. The automobile was duly registered according to the laws of the State of New Hampshire, and was not being used in Massachusetts in violation of any laws of the Commonwealth of Massachusetts, it was therefore duly registered and not a trespasser upon the highways.

"5. If the automobile was being used at the direction and on the business of one Lacaillade, the manager of the defendant, such use was not in the course of the business of the defendant, and the knowledge and permission of Lacaillade was not knowledge and permission of the defendant.

"6. The permission of any officer or manager of the defendant to use the defendant's automobile for any use other than that of the defendant's business was *ultra vires* and was not therefore the act of the defendant.

"7. There is no evidence on which the jury would be warranted in finding that the automobile at any time during the trip was being used on the business of the defendant.

"8. The defendant was a non-resident within the meaning of the automobile statutes and the automobile was duly registered in the State of the defendant's residence, it was therefore legally operated upon the highways of the Commonwealth."

"13. The negligence of Larivee, the operator of the automobile, was not the negligence of the defendant, and the plaintiff is not entitled to recover."

"15. Lacaillade was not an officer or director of the corporation, and any *ultra vires* act of his should not bind the corporation.

"16. There is no evidence that any officer or director of the corporation assented to or had knowledge of Lacaillade's use of automobile for his own purposes."

The judge submitted certain special questions to the jury. The counsel for the defendant objected to the form of the third question, and stated that the defendant contended that the real question was whether Lacaillade had authority, or whether it was within the scope of his employment, to permit the use of the automobile on his own business, and whether that permission amounted to the consent of the defendant; and he further stated that he thought that, if the manager had authority generally to use the automobile for his own business, it would follow that he would have authority to use it in Massachusetts as well as in Nashua for that purpose, and that he thought that was the real question at issue in the case; that whether or not Lacaillade had authority to permit the commission of an illegal act was not the issue from his point of view. The judge asked the defendant's counsel, "You would like to have added, 'Authority

to operate the automobile upon business of Mr. Lacaillade?" and the defendant's counsel replied, "Yes, and then whether it happened on the highways of Massachusetts or not I don't care." The judge thereupon re-framed the third question.

The special questions as submitted to the jury, with the answers of the jury thereto, were as follows:

"1. Was Larivee, an employee of the defendant company, acting within the scope of his employment at the time when the accident occurred?" The jury answered, "Yes."

"2. If Larivee, at the time when the accident occurred, was not acting within the scope of his employment by the defendant company, was he acting in furtherance of the personal business of Lacaillade, the manager of the business of the defendant company?" The jury answered, "Yes."

"3. Did Lacaillade, the manager of the business of the defendant company of Nashua, have authority from the defendant company to direct or permit Larivee, an employee of the defendant company, to operate the automobile upon Lacaillade's personal business on the highway in Massachusetts at the time the accident occurred?" The jury answered, "Yes."

The jury found for the plaintiff in the first action in the sum of \$1,000, for the plaintiff in the second action in the sum of \$1,500, for the plaintiff in the third action in the sum of \$100, and for the plaintiff in the fourth action in the sum of \$2,000. The defendant alleged exceptions.

H. S. Avery, for the defendant.

A. S. Howard, for the plaintiffs.

RUGG, C. J. These are four actions of tort whereby the plaintiffs seek to recover compensation for injuries sustained by them on June 22, 1918, through collision with an automobile owned by the defendant. Confessedly the plaintiffs, at the time travelers on a highway in Dracut in this Commonwealth, were in the exercise of due care and the operator of the automobile was negligent.

The defendant is a corporation domiciled in Maine, but had maintained in 1918 for more than thirty days before the plaintiffs' injuries several places of business in Massachusetts. It also maintained at Nashua, in the State of New Hampshire, a place of business in connection with which the automobile in

question was used. It was registered in New Hampshire but not in Massachusetts. It was purchased in July, 1917, by the defendant on requisition from one Lacaillade who for over five years had been manager of the defendant's business at Nashua. It appeared that in 1917 Lacaillade used the automobile five or six times to go from Nashua to Lawrence in this Commonwealth, chiefly on business of his own, but there was no evidence on the point whether it was registered in Massachusetts in that year. He occasionally, and whenever he so desired, used it in his own business around Nashua without complaint by the defendant. He had sole control over its use. He had ten or twelve men under him in the employ of the defendant at Nashua where a general meat packing business and the business of storing furs and household furniture was conducted. There were executive officers of the defendant in Boston but none in New Hampshire. A general superintendent visited the Nashua place of business every other week, and perhaps once or twice a year other officers of the defendant went there. On June 22, 1918, Lacaillade having sold a gas stove, which he had stored without pay for several months in the defendant's storehouse at Nashua, to his cousin in Lawrence, Massachusetts, asked one Larivee, employed by the defendant as chauffeur at Nashua, to take the stove to its new owner. It was while returning to Nashua from that journey to Lawrence that the automobile came into collision with the plaintiffs, causing the injuries here in suit.

The automobile at the time of the accident was an outlaw upon the highways of Massachusetts. The defendant was not a "non-resident" within the meaning of St. 1909, c. 534, § 1, as amended by St. 1914, c. 204, § 1, in force on the day of the accident. By that statute "non-resident" as used in the automobile laws, in substance, is defined to mean "residents of States or countries who have no regular place of abode or business in this Commonwealth for a period of more than thirty days in the calendar year." It is conceded that the defendant had places of business in Massachusetts. Therefore the provisions of the automobile law respecting non-residents were not applicable to it. It was subject respecting all its automobiles within the Commonwealth to the absolute prohibition against operating them upon the highway unless registered in accordance with our law. St. 1909, c. 534, § 9.

Dudley v. Northampton Street Railway, 202 Mass. 443. *Holden v. McGillicuddy*, 215 Mass. 563, 565. *Dean v. Boston Elevated Railway*, 217 Mass. 495, 498. The words of the statute are so plain as to render any other construction not rationally possible. If it be thought harsh to impose such stringent liability upon actual non-residents who have places of business in this and other States, relief must be sought from the Legislature and not from the judiciary. See St. 1919, c. 88.

There is no evidence whatever to the effect that the automobile at the time of the accident was being operated on the business of the defendant. The evidence shows that it was a personal matter of Lacaillade upon which it was driven into Massachusetts.

There is no evidence on this record which warrants the conclusion that the defendant expressly or impliedly authorized Lacaillade, the manager of its Nashua branch, to operate or cause to be operated its automobile on the highways of Massachusetts on his own business. There was evidence from which the inference might be drawn that Lacaillade was authorized to use the automobile in the neighborhood of Nashua on his own business and pleasure. The general course of conduct would constitute evidence to that end. But it was a wholly different matter to use the automobile in Massachusetts. The operation of the automobile in Massachusetts by the authority of the defendant not only would subject it to a fine, St. 1909, c. 534, § 10, but also would render it liable to heavy and unusual civil liability. It would be responsible for injuries caused by the negligent operation of the automobile even though not at the time being used in its business. The consequence of one permitting a nuisance, such as an unregistered automobile operated upon a highway, is that he is responsible for injuries caused thereby even though it is at the moment being used in the business or pleasure of another. *Gould v. Elder*, 219 Mass. 396. *Koonovsky v. Quellette*, 226 Mass. 474. Authority to impose liabilities of this kind upon the defendant, having their origin in authority to commit a crime, cannot be inferred from mere employment as manager of a business dealing in the necessities of life. For all things done within the natural course of the management of its Nashua branch and in furtherance of its business by Lacaillade, the defendant would be liable. On the

occasion in question the automobile was not being used to promote its affairs but for something quite outside its business.

There is nothing in the evidence which warrants the inference that the defendant knew or ought to have known that Lacaille was using the automobile in Massachusetts for his own business or pleasure, so that acquiescence in such use might be implied. The day of the accident was the first time it had been used in Massachusetts in 1918. If it be assumed in favor of the plaintiffs that the automobile was not registered in Massachusetts in 1917, the use of it by Lacaille five or six times to visit his family in Lawrence is not enough to fasten knowledge, consent and responsibility upon the defendant under all the circumstances. It does not appear that this use was at times and under conditions likely to come to the attention of the defendant.

The defendant's requests for instructions plainly cover this point. The remarks of counsel respecting the form of the third question did not amount to a waiver of his requests and do not appear to have misled the judge in any particular. They were made after the requests for rulings had been denied and the law thus established for the trial.

Exceptions sustained.

ROXBURY PAINTING AND DECORATING COMPANY & others vs.
MARIETTA NUTE & others.

Suffolk. January 8, 1919. — May 22, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Mechanic's Lien. Joint Tenants and Tenants in Common.

In a petition for the establishment of a mechanic's lien under R. L. c. 197, the respondents were two sisters who owned the real estate as tenants in common and one to whom they had agreed in writing to sell it, the agreement providing that possession should be given to the prospective purchaser on delivery of the deed by the owners, the premises then to be in the same condition as when the agreement was signed, "reasonable use and wear of the buildings thereon only excepted." Previous to the making of the agreement the prospective purchaser made a contract with the petitioner for repairing the premises and was permitted by the owners to take possession of the premises so that the petitioner might do his work. Subsequently the purchaser did not carry out his agreement and the real estate never was conveyed to him. Held, that the fore-

going facts alone did not warrant a finding that the agreement of the prospective purchaser with the petitioner was made by consent of the owners or of a person rightfully acting for them in procuring or furnishing such labor or materials.

At the trial of issues framed upon the petition above described, there was further evidence warranting findings that one of the tenants in common, knowing that the prospective purchaser could not carry out his agreement to purchase the premises without procuring a loan secured by a mortgage thereon and that such loan would not be procured unless the premises were placed in proper repair, agreed orally with the prospective purchaser that the agreement for purchase should be so far modified as to permit the prospective purchaser to take immediate possession of the premises for the purpose of having the repairs in question made and of procuring the mortgage loan and therewith paying the purchase price named in the contract. *Held*, that the question, whether the tenant in common who agreed to such a modification of the contract consented to the making of the contract between the prospective purchaser and the petitioner, was for the jury.

At the same trial, it appeared merely that the tenant in common who agreed with the prospective purchaser to the modification of the agreement had control and management of the real estate for herself and her cotenant, her sister, and that she had told her sister of the progress of the repairs on the premises. *Held*, that a finding was not warranted that the absent tenant in common had consented to the modification of the agreement between the petitioner and the prospective purchaser for the repairs on the premises.

Where, in a petition for the establishment of a mechanic's lien under R. L. c. 197 against two sisters who owned the real estate as tenants in common, it appeared that a contract for labor and materials was made with the petitioner by one who did so with the consent of one of the tenants in common, but there was no evidence warranting a finding that the contract was made with the consent of the other tenant in common, it was *held* that the lien might be established as to the interest of the tenant in common who consented to the making of the contract with the petitioner, and must be dismissed as to the other tenant in common.

PETITION, filed on July 13, 1914, in the Municipal Court of the Dorchester District under R. L. c. 197 by the Roxbury Painting and Decorating Company, a corporation, for the establishment of a mechanic's lien upon property owned by the respondents Marietta Nute and Harriet E. Young as tenants in common. Samuel C. Hathaway, who had agreed in writing to purchase the property and had made contracts with the petitioner for the work and material for which the lien was claimed, also was joined as a respondent. Two other contractors, Joseph A. Duff and Leslie S. Lewis, who made claims under similar circumstances, filed intervening petitions.

On appeal to the Superior Court, issues for a jury were framed and were tried before *Sisk, J.* The material evidence is described

in the opinion. At the close of the evidence and subject to exceptions by the petitioners, the judge ordered answers to the issues, in substance, that the labor performed and furnished as described in the petitions was not performed nor furnished by virtue of an agreement with or by consent of the respondents Nute and Young or of either of them or of a person having authority from or rightfully acting for them. The petitioners alleged exceptions.

R. J. Lane, for the petitioners.

P. Nichols, for the respondents.

CARROLL, J. The petitioners seek to establish a lien for labor performed and materials furnished in the repair and alteration of a building on land owned by the respondents Mrs. Young and Miss Nute (hereinafter called the owners), as tenants in common. The work was performed under contracts of the respondent Hathaway with the petitioners. Hathaway made no appearance; his deposition was taken on interrogatories propounded by the petitioners and cross interrogatories of the owners. In the Superior Court a verdict was ordered for the owners.

It was not denied that on March 25, 1914, the owners, by a contract under seal, agreed with Hathaway to sell him the premises for \$5,000. Of this amount \$250 was paid, and the agreement provided that the deed was to be delivered on or about April 20, 1914. The remainder of the purchase price was to be paid by a note of \$2,500 secured by a first mortgage on the premises, payable to Marietta Nute (one of the owners) and by payment in cash of \$2,250 on delivery of the deed. It was further provided that possession was to be given to Hathaway on delivery of the deed, the premises to be in the same condition as when the agreement was signed, "reasonable use and wear of the buildings thereon only excepted." Hathaway never paid nor tendered payment of the \$2,250 and the agreement was not carried out. The owners retained the \$250 paid by Hathaway.

A few days before the execution of the agreement Hathaway contracted with the petitioners for extensive repairs and alterations upon the house, representing that he was the owner. The petitioners entered upon the premises and made the repairs and alterations. April 3, 1914, a second contract was made by Hathaway with the petitioner the Roxbury Painting and Decorating Company to do additional papering and painting, which work was

performed. Work on the house was discontinued by the petitioner Duff on April 15, 1914, by the petitioner Lewis on April 18, 1914, and by the petitioner the Roxbury Painting and Decorating Company on April 24, 1914. There was evidence that Miss Nute was on the premises March 28, 1914, when the work was in progress, and when asked if "she wanted to come in" said "'No,' that . . . she would just walk around the house," and again on April 11 she visited the premises and then went through the building and remarked, "How beautiful the house looked and what a great deal of work was put in the house." Hathaway in his answers to interrogatories, stated that "Miss Nute visited the place while repairs were going on four or five times," and "spoke of the great change he had made in the appearance of the place; she said it looked like a palace;" that "He employed other mechanics to do other work on the house, amounting to about \$1,700;" and that "the work of the petitioners was necessary to make the house habitable."

Under R. L. c. 197, § 1, a lien may be established for labor performed and materials furnished in the repair of a building by virtue of an agreement with "or by consent of the owner of such building," or "of a person . . . rightfully acting for such owner in procuring or furnishing such labor or materials." By the contract of sale dated March 25, 1914, the owners were to convey the premises to Hathaway on or before April 20, 1914; and if this contract was not subsequently modified, then the owners did not agree that Hathaway could charge them with responsibility for his contract and the work was not done with their consent within the meaning of the statute, and he was not rightfully acting for them in procuring or furnishing such labor or material. Mere notice that he intended to repair the house, and knowledge of the progress of the work and appreciation expressed over the improvements made, were not enough to establish a lien on the owners' estate. When an owner of land agrees to sell it and allows one who has agreed to buy it to take possession of the property, the owner does not thereby authorize such person to impose a lien on the land, unless by implication the owner authorized the purchaser to contract for the repair and alteration of the building. As stated in *Hayes v. Fessenden*, 106 Mass. 228, at page 230: "Their [the owners] contract for a sale of the land to Fessenden,

notice that he intended to build upon it, and knowledge of the progress of the work, charged them with no responsibility for it to any one." *Saunders v. Bennett*, 160 Mass. 48. *Courtemanche v. Blackstone Valley Street Railway*, 170 Mass. 50.

The petitioners contend that the contract of sale of March 25, 1914, was not the final agreement between Hathaway and the owners; that the owners knew that Hathaway could not carry out this agreement, and agreed that he should make the repairs and place a mortgage on the property, and pay them the purchase price out of the money secured by the mortgage. To support this contention they offered the evidence of Hathaway, that he talked with Miss Nute before and after March 25, 1914, about the necessity of "raising money required to purchase said estate by placing a mortgage thereon with some bank," and that Miss Nute agreed "to my raising a mortgage on the place, providing they were paid in full," and it was agreed "that I would repair the property in order to raise money to pay them off in full . . . the house . . . was unfit for any one to live in," and we agreed "that I would put it in condition; such would allow my raising funds to pay them off in full;" that he told Miss Nute "about the alterations that were being made, both before the agreement was signed and afterwards. . . . He explained fully to Miss Nute about his repairing the house and putting it in suitable condition to live in, and Miss Nute agreed with him fully as to all his plans, and even with a knowledge that he was going to obtain a mortgage in the bank;" that he also told her "he had taken it up with the Five Cents Savings Bank in Boston and had obtained figures from the Roxbury Decorating Co. in regard to decorating the place;" that he first saw Miss Nute on March 10, 1914, and saw her almost daily for over a month after that date.

William H. Fanning, treasurer of the Roxbury Painting and Decorating Company, testified that about April 11, 1914, he called on Miss Nute and wanted to know if Hathaway had a deed of the property. She told him he did not have a deed, that he had agreed to purchase the property, and paid a substantial amount down, and "was negotiating for a mortgage from the bank in order that he might carry through the deal." He further testified: "I told her we were there doing work, painting, and had a contract with Mr. Hathaway, two contracts, one for the inside and one for the

outside." She said she expected to hear from Hathaway every day, but up to that time he had not called on her; that "he was negotiating with the bank for a mortgage in order that he might live up to the terms of his agreement and carry through the deal on the property and she expected to hear from him most any day;" that "Hathaway would have to put the house in condition . . . in order to get his mortgage from the bank, and he was making the repairs." He also testified that Miss Nute did not tell him to cease work on the building; and that one of his workmen reported to him that a couple of days after this interview Miss Nute was about the premises.

Clarence P. Adams, a foreman employed by the Roxbury Painting and Decorating Company, testified that about April 11 Miss Nute came to the premises and went through the building; that "she asked the carpenter what he was going to do with the bathroom floor" and he "told her he was waiting for the electricians to finish wiring and he would put the floor down." Much of this evidence was denied by Miss Nute. She testified that before the agreement of March 25 was signed she gave the key to Hathaway to look over the premises, but was unable to get it back from him; that he represented to her that he was a contractor and had employees who were idle and asked if they could clean up the house; that she never consented to his making any repairs on the house and first discovered that the men were not Hathaway's employees when Fanning called on her. She further testified that there was no extension of the agreement and no consent that Hathaway should mortgage the premises; that she was not informed and had no knowledge that he could not carry out the agreement.

The counsel for the owners "duly objected to the admissibility of so much of the foregoing testimony as related to the placing of a mortgage upon the premises by a bank, or to the making of repairs or alterations upon the premises and to communications by the witness with Miss Nute in regard to the same, and the trial judge excluded, subject to the plaintiffs' exceptions duly saved, so much thereof as related to matters occurring prior to the signing of the contract, but subject to the respondents' said objections and exceptions admitted the remainder of said evidence objected to."

The parties could modify the original contract by a subsequent

parol agreement. *Gilman & Son, Inc. v. Turner Tanning Machinery Co.* 232 Mass. 573. The evidence of what was said by Miss Nute after the written contract was made, tended to show that the original contract was so modified by agreement of Hathaway and Miss Nute; and if the jury believed this evidence they could have found that Hathaway was to make the repairs in order that he might secure a mortgage on the premises and pay the owners the entire purchase price in money, and that Miss Nute, by this arrangement, consented to Hathaway's making the contract for the labor performed and materials furnished, within the meaning of the mechanic's lien statute, R. L. c. 197. *Davis v. Humphrey*, 112 Mass. 309. *Carew v. Stubbs*, 155 Mass. 549. *Brown v. Had-dock*, 199 Mass. 480.

If this evidence showing that the written contract was qualified by a subsequent parol agreement were believed, a lien might be established on the interests of Miss Nute in the property, although there was no evidence to show that Mrs. Young was in any way indebted to the petitioners. She was a sister of Miss Nute, and while the latter had control and management of the property and collected the rents, Mrs. Young resided in another city and knew nothing of the repairs or alterations and made no agreement with Hathaway except the written agreement of March 25; the statement of Miss Nute that she had talked with her sister after Fanning's visit and informed her as the work progressed, is not enough to show that Mrs. Young consented to a change in the written agreement; and on all the evidence she was not shown to have consented to any modification of the agreement, or to have authorized any one to make a separate and independent agreement for her.

While one tenant in common cannot encumber the estate of his cotenant, *Muskeget Island Club v. Prior*, 228 Mass. 95, the interest of Miss Nute could be conveyed or taken on execution, and a lien could be established on her interest in the property. We can see no valid objection to establishing a mechanic's lien on the interest of one tenant in common of real estate. See *Kirby v. Tead*, 13 Met. 149; *Webber Lumber & Supply Co. v. Erickson*, 216 Mass. 81; *Mellor v. Valentine*, 3 Col. 260; *Hillburn v. O'Barr*, 19 Ga. 591.

Nor do we think it fatal to the petitioners that they have proceeded against both owners and have described them as such, and

in their petition state that the labor and materials were supplied with their consent. There is nothing in the statute which prevents a creditor who petitions to establish a lien against two or more tenants in common of real estate, from securing his lien upon the interest of the tenant who makes the contract or who authorizes the improvement to be made. The share of that tenant may be held for the work thus authorized and a lien established against it. See, in this connection, *Taft v. Church*, 164 Mass. 504; *Washburn v. Burns*, 5 Vroom, 18.

It follows that in the case of Mrs. Harriet E. Young the petitioners' exceptions are overruled; in the case of Miss Marietta Nute they are sustained.

So ordered.

OLD COLONY TRUST COMPANY, executor, vs. ANTONIETTA DI COLA.

Norfolk. March 6, 1919. — May 22, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Will, Validity. Undue Influence. Evidence, Remoteness, Relevancy and materiality, Admissions, Competency, Of soundness of mind, Opinion: expert. Physicians and Surgeons. Witness, Expert.

At the trial of an issue as to whether an entire instrument, alleged to be a will, was procured to be executed by fraud or undue influence of five designated persons "or any of them," among them a woman, who at the time of the decedent's death had been living with him as his housekeeper and had been known generally as his wife, and to whom there was given a bequest not amounting to the entire property of the decedent, evidence as to early relations of the decedent and the woman, where the relations in question were alleged to have existed about twenty-five years before the death of the decedent and where the testimony was offered before the woman had testified, is not admissible to affect the credibility of the woman, because she had not yet testified, nor as an admission affecting the validity of the will, because no statement of a beneficiary under a part only of a will was admissible at the trial of the issue above described as an admission affecting the validity of the whole will.

At the trial of the issue above described, the judge in his discretion may exclude as too remote events in the life of a son of the woman, reputed to be the wife of the decedent, occurring twenty-four years before the death of the decedent, as well as occurrences at the decedent's home six years before his death.

In this Commonwealth, only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent to give their opinions as to the testator's mental condition.

The mere fact that a witness is a surgeon or a physician does not of itself qualify him as an expert in mental diseases.

A surgeon whose practice had been confined to surgery from the time of his graduation from a medical school and who, although he took such courses in mental diseases as were offered at the school in addition to practical work at the Boston Insane Hospital, clinics at Danvers Insane Hospital and clinics at the School for Feeble-Minded at Waverley, had not attempted to treat any kind of mental diseases, was permitted by a judge presiding at the trial of an issue, whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, to testify that in his opinion the testator had died of surgical shock, which causes anæmia, mental apathy, torpor and dulled senses. The judge excluded the opinion of the witness as to the testator's soundness of mind from the time he was shot until the time of his death. *Held*, that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind.

An attorney who drew a will and was present when it was executed, but who was not a subscribing witness, may be permitted to state that he did not hear the testator say or do anything which indicated that he was not of sound mind.

After the woman, the reputed wife of the testator, at the trial above described had testified that the testator, both before and after she had procured a divorce from her husband, had promised to marry her, she was asked if the ground of her divorce was the desertion of her husband. The testimony was excluded. *Held*, that the exclusion was proper, as the testimony was irrelevant.

Testimony at the same trial of the attorney who procured the divorce of the woman from her former husband, except wherein it tended to contradict testimony previously given by the woman, was *held* properly to have been excluded.

At the trial of the issues above described, the judge instructed the jury that they were entitled to take into consideration the fact, if they found it to be a fact, that the will was unreasonable and unnatural, but that they should treat such evidence with care, and further instructed them as follows: "The law does not say that a man may not make an unjust or an unreasonable will. That is to say, it does not say that he may not make a will which appears to a jury to be unjust and unreasonable, because if he is of sound mind, has mind enough to make a will, follows the formalities and is not controlled and influenced by undue influence, it is his property, he can make such a will as he wants to and it is not for any jury to undertake under those circumstances to make his will for him." *Held*, that such instructions were proper.

Further instructions of the judge at the same trial, to the effect that statements in the divorce libel of the reputed wife of the testator, which were contradictory to statements made by her on the stand, were not to be considered by the jury as evidence of their own truth or falsity, but were to be considered only as affecting the credibility of the witness, were *held* not to be erroneous.

APPEAL from a decree of the Probate Court for Norfolk County allowing the will of Gaspare Di Cola, late of Brookline.

Issues were framed and were referred to the Superior Court for a jury trial as to the execution of the will, the soundness of the

testator's mind, and as to whether the alleged will was "procured to be made by the fraud or undue influence of Antonio G. Tomasello, Joseph A. Tomasello, Antonino Marchetti, Wayland F. Dorothy, and the person described in the will as the wife Antonina Di Cola (otherwise known as Antonina Bova) or any of them."

The issues were tried in the Superior Court before *Hammond, J.* Material evidence and exceptions by the appellants are described in the opinion.

The appellants asked for, and the judge refused to make, the following rulings:

"17. Where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear."

"19. Gross inequality in the dispositions of the instrument, when no reason for it is suggested either in the will, or otherwise, may require explanation on the part of those who support the will to induce the belief that it was the free and deliberate act of a rational, selfpoised and clearly disposing mind,"

"21. In a case of unaccountable inequality, justice and policy require clear and satisfactory proof of a free, deliberate, and disposing mind, before such a paper shall be established as a true and valid will.

"22. The unexplained failure of a testator, to mention or provide for a person, who would naturally have some claim on his remembrance, is evidence of want of testamentary capacity, undue influence, or fraud and should be weighed by the jury with all the other evidence in the case."

Subject to exceptions by the appellants, the judge charged the jury as follows:

"You are entitled to take into consideration on the question of whether he was of sound mind and on the question of undue influence, which I will come to in a minute, you are entitled to take into consideration the fact, if you find it to be a fact, that the will was, if you believe it to be, unreasonable and unnatural. But you should consider that question with care and be careful how you treat that evidence, for this reason: The law does not say that a man may not make an unjust or an unreasonable will. That is to say, it does not say that he may not make a will which appears to a jury to be unjust and unreasonable, because if he is of sound

mind, has mind enough to make a will, follows the formalities and is not controlled and influenced by undue influence, it is his property, he can make such a will as he wants to and it is not for any jury to undertake under those circumstances to make his will for him, and, therefore, you would be remiss in your duty as jurors who are sworn to decide cases here on the law and on the evidence to decide that question because you thought the will was unjust or unfair or you could make a better one. . . .

"I stated to counsel that I should instruct you in regard to the effect of the evidence introduced, to wit, the statement in the divorce libel, the divorce libel itself, and the statement made by Mrs. Di Cola, the woman who has been called Mrs. Di Cola, at the time she talked to the lawyer. As to that evidence, I admitted the divorce libel not because anything that is said in the divorce libel is evidence of the fact that the thing said was true. That is to say, if you read the divorce libel that she signed, that her husband deserted her at such and such a time, you are not to take that as evidence of the fact that he did desert her. The reason why that divorce libel is competent evidence in this case is because of the statement that is made in it that she had always been true to her marriage vows and as she testified that she had been in the position of wife to Mr. Di Cola for twenty-five years it is evidence on the question of the credibility of her testimony. It is not evidence of the fact whether she had been or not faithful to her marriage vows, but it is evidence that at some other time on some other occasion she said something which you might find to be inconsistent with her statement on the stand; and the same thing is true as to what she said to the lawyer about being the housekeeper, keeping house for him for twenty-four years. If you find that is inconsistent with the statement she made on the stand, it is not evidence that she was his housekeeper, but it is evidence as to the credibility of what she said on the stand and you are to take it into consideration and give it such credibility as you may see fit in deciding this case."

The jury answered the issues favorably to the executor; and the appellant alleged exceptions.

H. E. Perkins, for the appellant.

Asa P. French, (*S. L. Bailen & F. Leveroni* with him,) for the appellee.

CARROLL, J. This is an appeal from a decree of the Probate Court allowing the will of Gaspere Di Cola. Issues were framed, and the trial was in the Superior Court. The woman, Antonina Bova, described in the will as the wife of the testator and known as Mrs. Di Cola, kept house for him for several years. He bequeathed to her the furnishings of the home, jewelry and Italian government bonds. She was also to receive \$100 a month during her life, and in addition was given the use of a tenement in the testator's house in Brookline. The remainder of his estate was given to his brother.

The jury found that the will was executed according to law, that the testator was of sound and disposing mind and memory at the time of its execution and that the will was not procured through fraud or undue influence.

We deal with the questions raised by this bill of exceptions in the order in which they are discussed by the appellant.

1. One of the witnesses to the will, after testifying that on the day of the testator's funeral Mrs. Bova told him she was not Di Cola's wife, was asked what she said about the beginning of her relations with Di Cola, it appearing that the intimacy between them began in Sicily, where they both lived, more than twenty-five years before his death. It is argued that this evidence was admissible to affect the credibility of Mrs. Bova; but there is nothing in the record to show that when the evidence was offered Mrs. Bova had testified. It was not admissible as an admission made by her, for while she was one of the parties charged with unduly influencing the testator, and a beneficiary under the will, the issue before the jury was not the validity of the bequest to her, but the validity of the whole will, and one of the beneficiaries could not prejudice the rights of the other legatees by admissions indicating her fraud or undue influence in procuring the execution of the will. *Aldrich v. Aldrich*, 215 Mass. 164. *McConnell v. Wildes*, 153 Mass. 487, 489, and cases cited.

2. The appellant offered to show by Antonino Bova, a son of Mrs. Bova, the circumstances and surroundings of his aunt with whom he was left in Italy twenty-four years before, when his mother came to this country. No offer of proof was made; and even if the condition in life of the aunt were relevant, the occurrence was so remote that the judge in the exercise of his discretion

might properly exclude it and his decision is not to be reversed unless it is clearly unfounded. The evidence of Bova relating to the quarrels between Di Cola and his mother was properly excluded for the same reason. *Johnson v. Foster*, 221 Mass. 248, 252. *Aldrich v. Aldrich*, *supra*. *Jenkins v. Weston*, 200 Mass. 488. *Batchelder v. Batchelder*, 139 Mass. 1.

3. Mrs. Bova secured a divorce from her husband which became absolute in June, 1916. After she had testified, her attorney in the divorce proceedings was permitted to testify to certain statements made by her, solely for the purpose of contradicting her. The appellant excepted to the exclusion of the evidence of the son Antonino Bova, to the effect that he went to the attorney's office and complained of the relationship existing between the testator and his mother and that the divorce proceedings were the result of his efforts. The record does not show at what stage of the trial this evidence was offered. The statements of Bova to his mother's attorney were not admissible, and his efforts in securing the divorce were not material to the issue on trial.

4. The testator was shot on the evening of September 20, 1916. He was taken to the hospital where he arrived about 10:45 that night, and died about five o'clock on the morning following.

Dr. Albert Ehrenfried testified that he was a surgeon whose practice was confined to surgery from the time of his graduation; and although he had taken such courses in mental diseases as were offered at the medical school "in addition to practical work at the Boston Insane Hospital, clinics at Danvers [Insane Hospital], clinics at the School for the Feeble-Minded at Waverley," he had not attempted to treat any cases of mental disease. He gave his opinion that the testator died of surgical shock; and that surgical shock causes anæmia, mental apathy, torpor and dulled senses. He was not allowed to give his opinion of the testator's soundness of mind from the time he was shot until the time of his death. In this Commonwealth, only the witnesses to the will, the testator's family physician, and experts of skill and experience in the knowledge and treatment of mental diseases, are competent to give their opinions of the testator's mental condition. *May v. Bradlee*, 127 Mass. 414, 421. See *Commonwealth v. Rich*, 14 Gray, 335; *Emerson v. Lowell Gas Light Co.* 6 Allen, 146.

The mere fact that a witness is a surgeon or a physician does not of itself qualify him as an expert in mental diseases. It requires special skill and experience in the knowledge and treatment of such diseases to make a physician or surgeon competent to give his opinion on the subject. *Boston Safe Deposit & Trust Co. v. Bacon*, 229 Mass. 585, 590, and cases cited. Whether a witness has sufficient knowledge, learning and experience to state his opinion must be left largely to the discretion of the presiding judge, *Union Glass Co. v. Somerville*, 228 Mass. 202, *Barker v. United States Fidelity & Guaranty Co.* 228 Mass. 421, *Jordan v. Adams Gas Light Co.* 231 Mass. 186, 189; and we cannot say that there was reversible error in refusing to allow him to express his opinion of Di Cola's soundness of mind.

5. Wayland F. Dorothy, Esquire, who drew the will and was present when it was executed, though not a subscribing witness, was asked if he heard Di Cola say or do anything which indicated he was not of sound mind; he answered he did not, to which the appellant excepted. Dorothy was not asked his opinion, but to state the facts as he observed them; his attention was called to the acts and statements of Di Cola: the evidence was admissible. *Gorham v. Moor*, 197 Mass. 522, and cases cited.

6. Mrs. Bova testified that Di Cola, both before and after the divorce was granted, promised to marry her. She was then asked if the grounds of her divorce were the desertion of her husband. This evidence was properly excluded: it had no bearing on the issue before the jury. The testimony of the police sergeant describing what occurred at the Di Cola home was also properly excluded: it had reference to an occurrence six years before the time of the trial, and was so remote that the judge could rightly refuse to admit it. *Jenkins v. Weston*, *supra*. There was no error in the manner in which the judge dealt with the testimony of the attorney who acted for Mrs. Bova in the divorce proceedings: he was permitted to testify to her statements which tended to contradict her, and for this purpose the testimony was admissible; the additional evidence excluded was immaterial.

7. The appellant asked for certain instructions dealing with the effect of gross inequality in the disposition of the estate as evidence of fraud or unsoundness of mind. While the jury had a right to consider the reasonableness of the will, the mere fact

that it was in the opinion of the jury unreasonable, was not of itself sufficient to show that it was the result of undue influence or unsoundness of mind. *Davenport v. Johnson*, 182 Mass. 269. The jury were fully and accurately instructed on this point.

There was no error in what was said to the jury concerning the divorce libel and Mrs. Bova's statements to her attorney as affecting her credibility.

We find no error in the conduct of the trial.

Exceptions overruled.

MICHAEL SCHENA (afterwards DOMENICO A. SCHENA, administrator,) vs. MADELINA BACIGALUPO.

Essex. March 10, 1919. — May 22, 1919.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Of one controlling real estate. Landlord and Tenant.

Where, at the trial of an action for personal injuries, received by one alleged to be a tenant in a building owned by the defendant and caused by a defect in a passageway in the building, there is no evidence as to who caused the alleged defect nor how long it had existed, nor whose tenant the plaintiff was nor the terms of his tenancy, a verdict should be ordered for the defendant.

TORT for personal injuries, alleged to have been received by one Michael Schena while a tenant on premises owned by the defendant. Writ in the Central District Court of Northern Essex dated December 1, 1914.

After appeal to the Superior Court, upon suggestion of the plaintiff's death, Domenico A. Schena, the administrator of his estate, was admitted as a party plaintiff to prosecute the action in his stead.

The action was tried in the Superior Court before *Bell, J.* The material evidence is described in the opinion. At the close of the evidence, the judge denied a motion by the defendant that a verdict be ordered in her favor. The jury found for the plaintiff in the sum of \$500; and the defendant alleged exceptions.

D. H. Fulton, for the defendant.

W. J. McDonald, for the plaintiff, submitted a brief.

CARROLL, J. The plaintiff in this action seeks to recover damages for personal injuries to his intestate, Michael Schena, who, he contends, was injured by reason of a defect in a common passageway on the defendant's premises. The jury found for the plaintiff.

There was evidence that the defendant was the owner of a building in which Michael Schena was a tenant; that the floor of the passageway between the tenant's room and the room of one Bocuco was defective; and that by reason of this defect the plaintiff's intestate was injured. There also was testimony showing that the adjoining premises were being repaired and some material for this work was taken from the defendant's building; but the record does not show how long the defect complained of existed, nor who caused it; and there is nothing in the evidence from which it could be inferred that the defendant was negligent, or responsible for the condition of the passageway. It does not appear from whom the plaintiff's intestate hired his tenement, — he may have been the tenant of the defendant or of Bocuco; nor whether Bocuco hired the whole or only a part of the building; nor what the terms of the lease were. Bocuco may have been the lessee under a written lease, and the passageway may have been a part of the leased premises; at least there is nothing in the evidence to contradict this assumption. On the evidence before us, there is nothing to show that the defendant owed the plaintiff any duty. The defendant's motion for a directed verdict should have been granted.

Exceptions sustained.

DAVID PODREN vs. ELIZA B. MACQUARRIE.

Suffolk. March 7, 1919. — May 24, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Assignment of lease. Frauds, Statute of. Agency, Evidence, Of assent. Estoppel.

The owner of a building made a lease of it in writing containing a provision that the lease should not be assigned without the consent of the lessor in writing and that for breach of its covenants the lessor might enter and repossess the premises. The lessee afterwards became a trustee under a declaration of trust and, without any

assignment of the lease to himself as trustee, assumed "as trustee, but not individually," to make a lease of a portion of the premises to a storekeeper and later as trustee directed that the storekeeper pay rent to the agent of the owner. The lessee becoming in arrears in payments of rent, the owner entered to dispossess him and gave a second lease in writing of the entire premises to one who caused the storekeeper to be evicted. In an action by the storekeeper against the owner for damages resulting from the eviction, it was *held*, that the action could not be maintained because, there never having been any valid assignment of the original lease by the lessee as an individual to himself as trustee, the plaintiff never received any title and was not rightfully on the premises.

At the trial of the action above described, there were in evidence promissory notes of the trustee, payable to the agent in charge of the premises for the owner, letters from the trustee to the agent and various transactions between them which, it was *held*, were insufficient to show that the original lessee had made an assignment from himself as an individual to himself as a trustee which had been assented to in writing by the owner.

At the same trial, it further appeared that, in a conversation between the plaintiff and the agent for the owner, the agent assured the plaintiff that his lease from the trustee was "all right" and that, relying on that assurance, the plaintiff thereafter paid rent and made repairs. *Held*, that, even assuming that the agent had authority to bind the owner by such statements, the defendant was not thereby estopped to rely on the statute of frauds and to refuse to be bound by the oral assurance of the agent.

TORT, later by amendment, TORT OR CONTRACT, for damages resulting from an alleged wrongful eviction of the plaintiff from premises owned by the defendant and alleged to have been rightfully in the possession of the plaintiff as lessee. Writ dated January 29, 1916.

In the Superior Court, the case was tried before *Jenney, J.* The material evidence is described in the opinion. The judge denied a motion of the defendant that a verdict be ordered in her favor. The judge by agreement of the parties submitted the case to the jury with the understanding that, if the jury found for the plaintiff, the judge would set the verdict aside and report the case to this court and, if this court were of the opinion that there was evidence warranting a submission of the case to the jury, judgment should be entered for the plaintiff in the amount found by the jury; and that, otherwise, judgment should be entered for the defendant.

The jury found for the plaintiff in the sum of \$1,200. The judge, in accordance with the stipulation, set the verdict aside and reported the case for determination by this court.

P. Rubenstein, for the plaintiff.

J. W. Spring, for the defendant.

CARROLL, J. The defendant made a written lease of the entire building numbered 75 and 77 Broad Street, Boston, to Fred L. Hewitt, for the term of five years beginning March 1, 1913. The lease provided that it was not to be assigned without the consent of the lessor in writing, and the right was reserved to enter for breach of the covenants and repossess the estate "as of the lessor's former estate and expel the lessee and those claiming under the lessee." Hewitt became trustee of the Briggs Trust, so called, under a written declaration of trust, and "as trustee, but not individually" executed a lease under seal to the plaintiff, of one of the stores in the building, for the term of three years and eight months beginning June 1, 1914. There was evidence that Abram Hoffecker, the defendant's agent, attended "to all matters connected with the building;" that on July 21, 1915, Hewitt as trustee wrote to the plaintiff directing him to pay the future rent to Hoffecker; and that thereafter for several months the plaintiff paid Hoffecker the rent.

Hewitt did not pay the rent for the building due under the terms of the lease, and on December 30, 1915, the defendant made an entry on the premises for breach of the covenants; and on the same day she made a lease of the entire building for the period of fifteen years from May 1, 1916, to the Kelsey Company. On January 12, 1916, a notice to quit, signed by Thomas H. King, who purported to have a written lease of the plaintiff's premises for the term of one year from January 1, 1916, from the Kelsey Company, was served on the plaintiff. After the receipt of the notice, a deputy sheriff saw the plaintiff and told him that if he did not quit the premises he would evict him. The plaintiff testified that in July, 1915, he showed his lease to Hoffecker and asked him "whether it was all right," and he said it was "as long as I paid the rent;" and relying on this statement the plaintiff made repairs on the store. There was no evidence that Hewitt the lessee, assigned the lease to the Briggs Trust, or to himself as trustee, and there was no written assent of the defendant to an assignment of the lease to any one.

The plaintiff's declaration is in contract and alleges that the defendant, regardless of her agreement, unlawfully evicted the plaintiff from the premises, to his great damage. The plaintiff bases his right to recover on the fact that he was in possession

of the premises under a written lease from Hewitt as trustee of the Briggs Trust. The defendant leased the premises to Hewitt. There was no written assignment of the lease from Hewitt to the trust, and the defendant made no agreement with any lessee other than Hewitt; she never consented to the Briggs Trust occupying the premises as the assignee of the lease, and, so far as the plaintiff's rights against the defendant are concerned, he is merely a tenant at will unless Hewitt as trustee of the Briggs Trust derived his title from the defendant. The plaintiff has not shown this: he has not proved that the title ever passed from Hewitt, or that there was any right or title in his lessor to execute a written lease of the premises. Under the statute of frauds (R. L. c. 127, § 3), an estate or interest in land created without an instrument in writing has the force and effect of an estate at will only; and no estate or interest in land can be assigned, granted or surrendered except by an instrument in writing or by operation of law. Having no title under his lease from the trust, even if the other elements necessary to establish his case were shown, the plaintiff cannot recover against the defendant. See, in this connection, *Emery v. Boston Terminal Co.* 178 Mass. 172; *Mathews v. Carlton*, 189 Mass. 285; *Scotti v. Bullock*, 225 Mass. 510.

Assuming that the letters and the promissory notes payable to Hoffecker signed Briggs Trust, by Fred L. Hewitt, Trustee, and the evidence of other transactions were properly admitted, they are insufficient to show an assignment in writing from Hewitt to the trust, or to himself as trustee.

The plaintiff contends that the defendant is estopped to deny the validity of his title under the written lease, because her agent, Hoffecker, assured the plaintiff that the lease from the trust was "all right" and that the plaintiff thereafter paid the rent and made repairs. The defendant made no written contract with the plaintiff. The plaintiff's lessor had no title, and the oral assurance of the defendant's agent did not make the lease a valid instrument. The statute of frauds prevents the plaintiff from recovering. The defendant is not estopped to rely on her rights and can refuse to be bound by the oral assurance of her agent that the lease was valid, even assuming that he had authority to bind her by such a statement. See *Graves v. Goldthwait*, 153 Mass. 268; *Sarkisian v. Teele*, 201 Mass. 596, 608; *Sprague v.*

Kimball, 213 Mass. 380. In *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, relied on by the plaintiff, it was not questioned that the lease had been assigned.

Even if the plaintiff's lease was executed by one who held a title to the entire building, the lease to Hewitt was broken by his failure to pay the rent according to its terms, and the defendant had the right to enter for breach of this covenant. See *Louis K. Liggett Co. v. Wilson*, 224 Mass. 456. In answer to this the plaintiff contends that there was a legal surrender of the Hewitt lease to the defendant. Without intimating that there was evidence to support this contention, see R. L. c. 127, § 3; *Smith v. Abbott*, 221 Mass. 326, it is sufficient to say that as the plaintiff has not shown that he was possessed of an estate greater than a tenancy at will, he cannot prevail. It also is unnecessary to consider whether there was any evidence of an eviction by the defendant. See *Aguglia v. Caricchia*, 229 Mass. 263.

As there was no evidence to warrant the submission of the case to the jury, judgment is to be entered for the defendant.

So ordered.

JOSEPH CAMBRA vs. MANUEL C. SANTOS & others.

FRANK SOUZA vs. SAME.

Barnstable. March 7, 17, 1919. — May 24, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Jurisdiction. Workmen's Compensation Act. Fishing Voyage. Ship. Negligence, Employer's liability. Partnership.

It here was *assumed*, without any question on the subject being raised, that a member of the crew of a fishing schooner, employed by the master as agent for himself and the other owners, if injured while on board the vessel in Boston Harbor by reason of the negligence of such master and owners, can maintain an action of tort at common law in a court of the Commonwealth against the owners of the vessel, and that, his injury being a maritime tort, the workmen's compensation act has no application to it.

In an action of tort at common law against the master and owners of a fishing schooner by a member of the crew for personal injuries sustained from an explosion of gasoline, when it was being put into the gasoline tank of the schooner in Boston Harbor, there was expert evidence that there should be no fire or light, except an electric light, in the vicinity of any place where gasoline is handled,

stored or used, that every storage tank should be provided with a vent pipe ending in a gooseneck and that gasoline should not be transferred from one place to another in open containers, and there was evidence that when the explosion took place the gasoline for the schooner was being passed along by the crew in open five gallon cans and emptied into the tank and that about one hundred gallons had been transferred in this manner, that there was no vent pipe in the tank, that in the cabin and the engine-room there were two lighted kerosene lamps and that there was a coal fire in the stove, the door of which was open, that the gasoline vapor could have arisen from the movement of the open cans while being passed along and under the existing weather conditions could have found its way to the partly opened companionway and down into the cabin, or that by reason of the absence of a vent pipe the residual vapor in the tank was forced out as the gasoline was poured in and passed down the space between the metal tank and the wooden casing through an opening in the deck at the pipe or elsewhere into the cabin and the engine-room below. *Held*, that there was evidence that the plaintiff was set at work without warning in a place which could have been found to have been peculiarly dangerous under the circumstances.

In the case above described it also was *held* that the question, whether the responsibility for the negligence was confined to the master as employer or owner *pro hac vice*, or was that of all the owners as partners in the enterprise, for whom the master was the agent, was a question for the jury on the evidence.

In the same case it appeared that the plaintiff was employed on a Provincetown lay, but there was evidence that the lay or share to which each member of the crew was entitled was a mere measure of compensation for services and that the members of the crew had no control over the schooner or over the disposal of the fish caught and that they could be discharged by the master at any time, and it was *held* that there was evidence that the plaintiff plainly was an employee and that the shares given to him and the other members of the crew did not create a partnership.

In the same case it was *held* that the questions of the due care of the plaintiff and of his assumption of risk were for the jury with the burden of proof on the defendants.

In the same case it was *held* that it could not have been ruled that the master of the schooner, whether he was the owner of the schooner *pro hac vice* or was acting as the agent of all the owners, was a fellow servant of the plaintiff, and that the responsibility for the defective and dangerous condition of the permanent and essential appliances to which the employees were exposed in performing their required work could not be delegated by their employer or employers.

TWO ACTIONS OF TORT, each by a member of the crew of the fishing schooner Mary C. Santos registered in Provincetown, against the master and the owners of that vessel, for personal injuries respectively sustained by the plaintiffs in the afternoon of February 24, 1916, in Boston Harbor from an explosion of gasoline. Writs dated June 25, 1917.

The answers of the defendants in each of the cases, in addition to a general denial, alleged that the plaintiff was not in the exer-

cise of due care but was guilty of negligence which contributed to his injury.

In the Superior Court the cases were tried together before Cox, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendants in each of the cases filed a motion that a verdict be ordered for them. The judge granted the motions, and in each of the cases ordered a verdict for the defendants. Thereupon he reported the cases for determination by this court, with the stipulation that, if the judge was right in ordering verdicts for the defendants, final judgment was to be entered for the defendants in each of the cases; otherwise, that the cases were to stand for trial.

J. D. W. Bodfish, for the plaintiffs.

E. C. Stone, for the defendants, submitted a brief.

DE COURCY, J. These two common-law actions of tort were brought to recover damages for personal injuries received by the plaintiffs, resulting from a gasoline explosion which occurred on board the fishing schooner Mary C. Santos, while she lay in Boston Harbor. The plaintiffs were members of the crew of the schooner.

The defendants were the owners of the schooner, namely, Manuel C. Santos, the captain in charge, owning twenty of the thirty-two equal shares, Joseph A. Manta, the agent, owning five shares and seven other persons owning one share each. When the vessel was built in 1904 she was equipped with sail power only. In the cabin were two kerosene lamps for lighting, and a coal stove for heating purposes. In 1914 an auxiliary gasoline engine was added, the only change in the construction of the schooner being what was incidental to the installation of the engine and its equipment. The engine was placed forward of the original cabin, "the engine-room and cabin were all one," and no change was made in the above mentioned method of lighting or heating. The gasoline storage tank was placed on the deck directly above the engine. It was made of metal, and was enclosed in a wooden casing, with an intervening space of four or five inches. The only openings provided were two in the top of the tank, and corresponding ones in the box over it, through which gasoline was poured into the tank. The gasoline was supplied to the engine through a pipe which extended from the bottom of the tank through an

opening in the deck. It passed through the cabin and engine-room, about three and five feet from the two kerosene lamps respectively. The coal stove was about eight feet from the gasoline engine; and the pipe, engine, lamps and stove were all in the same room.

The plaintiffs were hired by the captain, the defendant Santos, and the schooner was operated on what was called the Provincetown lay. When the captain landed his load of fish and sold it, he first deducted certain charges, called "great generals," which included bait, trawls, gasoline and all other supplies bought by him for the boat, except the food; then he took out twenty-seven per cent for the owners of the schooner, and sent it to the defendant Joseph A. Manta, as their agent; the remaining seventy-three per cent, after payment of the food bills or "small generals," was divided in equal shares among the crew, including the captain. The plaintiffs had no control over the schooner or the disposal of the fish caught; the captain was in full command and could discharge the members of the crew at any time; they had a right to quit, if they so desired, whenever the boat came in and the cargo was discharged; and they received as compensation for their services the lay or share of the proceeds of the trip.

In the afternoon of February 24, 1916, after the fish had been unloaded and some repairs made on the engine, the Mary C. Santos was towed out to a gasoline supply boat, the Smith-Tuttle, which was stationed in Boston Harbor. The captain ordered the plaintiffs, with other members of the crew, to assist in taking in a supply of gasoline. The men formed a line between the storage tank on the fishing schooner and the supply faucet on the gasoline boat, and the gasoline was passed along in five-gallon cans, and emptied into the tank. About one hundred gallons had been so transferred, when the explosion which injured the plaintiffs occurred in the cabin and engine-room below. It was then about four o'clock. It could be found that the explosion must have been caused by gasoline vapor, mixed with air in such proportions that it would explode, coming in contact with some flame in the cabin and engine-room. There was evidence that at about three o'clock two kerosene lamps were seen lighted there and that there was a coal fire in the stove, the door of which was open. The gasoline vapor could have arisen from the movement of the

open cans while being passed along, and under the weather conditions it could have found its way to the partly opened companion-way and down into the cabin. Or, it could be found that, by reason of the absence of a vent pipe, the residual vapor in the tank was forced out as gasoline was poured in, and passed down the space between the metal tank and the wooden casing, through an opening in the deck at the pipe or elsewhere, into the cabin and engine-room below. According to the testimony of the expert witness, Wedger, there should be no fire or light except an electric light, in the vicinity of any place where gasoline is handled, stored or used; storage tanks should be provided with vent pipes ending in a gooseneck, and gasoline should not be transferred from one place to another in open containers.

Confining ourselves to the alleged structural defect in the tank and appliances, there was evidence here of negligence in setting the plaintiffs at work without warning in a place which could be found peculiarly dangerous in the circumstances. *Maddox v. Ballard*, 218 Mass. 55. It was for the jury to say whether responsibility for this negligence was confined to Santos alone, as employer or as owner *pro hac vice* or was that of all the defendants as partners in the enterprise, having a common ownership, controlling the vessel through their agents, and sharing the profits and losses at the end of each trip. *Harding v. Souther*, 12 Cush. 307. *Adams v. Augustine*, 195 Mass. 289. *Crimmins v. Booth*, 202 Mass. 17. *McMurtrie v. Guiler*, 183 Mass. 451.

Plainly there was evidence that the plaintiffs were employees; that the lay or share given to them was in the nature of wages and did not create a partnership. *Baxter v. Rodman*, 3 Pick. 435. *Grozier v. Atwood*, 4 Pick. 234. The issues of their due care and assumption of risk were for the jury, with the burden of proof on the defendants. *Souden v. Fore River Ship Building Co.* 223 Mass. 509. St. 1914, c. 553. It could not be ruled that the fellow servant doctrine precluded the plaintiffs from recovery; the defendant Santos was the employer of the plaintiffs, either as owner *pro hac vice* or as agent of all the owners, and responsibility for the defective and dangerous condition of the permanent and essential appliances to which the employees were exposed in performing their required work cannot be delegated by the employer. *Perry v. Webster Co.* 216 Mass. 147.

It may be added that no question is raised as to the jurisdiction of our courts to enforce the common law rights of the plaintiffs. See *Calvin v. Huntley*, 178 Mass. 29. The Judicial Code of the United States, U. S. St. 1911, c. 231, § 256. And see *Duart v. Simmons*, 231 Mass. 313, as to the workmen's compensation act.

In our opinion the plaintiffs were entitled to go to the jury on the evidence; and in accordance with the report the cases are to stand for trial.

So ordered.

HIRAM C. CROWELL & another vs. WILLIAM J. DAVIS, executor.

Barnstable. March 31, 1919. — June 3, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Probate Court, Appeal. Words, "Aggrieved."

On an appeal from a decree of a single justice of this court allowing a petition brought under R. L. c. 162, § 13, to enter and prosecute an appeal from a decree of the Probate Court allowing an alleged will, the record showed that the alleged testatrix left also an earlier will, dated ten years before the one allowed, and that the petitioners, who were named as legatees in the earlier will, had no knowledge of its existence until after the time for filing an appeal from the decree allowing the later will had expired. The petition alleged unsoundness of mind and fraud and undue influence at the time of the alleged execution of the later will. The earlier will was filed for probate soon after it was found and a petition for its allowance was pending. It appeared at the hearing that one petitioner, who by the earlier will was given \$15,000, certain specific articles of personal property and a woodlot, was given by the later will only a legacy of \$10,000, and that the other petitioner was given \$1,000 by the earlier will and by the later will was given nothing. The single justice in effect ruled that the petitioners were persons "aggrieved" within the meaning of R. L. c. 162, § 13. *Held*, that it must be assumed that in granting the petition to enter the appeal the single justice found that the failure to claim an appeal from the decree of the Probate Court was without default on the part of the petitioners and that justice required a revision of the case, and that the ruling, that the petitioners as matter of law were persons who might be found to have been aggrieved by the decree, was right.

The granting by a single justice of the Supreme Judicial Court of a petition, brought under R. L. c. 162, § 13, to enter and prosecute an appeal from a decree of the Probate Court allowing an alleged will, necessarily imports that the single justice found that the petitioner's failure to enter his appeal was without default on his part and that justice requires a revision of the case.

A person named as a legatee in an earlier will filed for probate is a person "aggrieved" by a decree allowing a later will which gives him less or nothing.

In the case above described it appeared that an heir at law of the alleged testatrix had filed seasonably an appeal from the decree of the Probate Court allowing the alleged later will, and it was *pointed out* that the pendency of this appeal, which such heir at law had a right to waive at any time, did not protect the rights of the petitioners.

PETITION, filed in the Supreme Judicial Court on January 22, 1919, by Hiram C. Crowell and Susan K. Crowell of Dennis, for leave to enter and prosecute an appeal from a decree of the Probate Court for the county of Barnstable made on March 6, 1918, allowing an alleged will of Rebecca H. Baker, late of Dennis, dated February 18, 1916.

The case was heard by *De Courcy, J.*, the evidence being reported by a commissioner appointed under Equity Rule 35, and described in substance in the opinion.

On February 14, 1919, the single justice made a final decree allowing the petition. The respondent, William J. Davis, the executor named in the will of February 18, 1916, appealed.

The case was submitted on briefs.

W. A. Morse & F. C. Swift, for the respondent.

W. D. Turner & H. M. Hutchings, for the petitioners.

CROSBY, J. This is an appeal from a final decree, entered by a single justice of this court upon a petition brought under R. L. c. 162, § 13, allowing the petitioners to enter and prosecute an appeal from a decree of the Probate Court for the county of Barnstable, dated March 6, 1918, allowing a certain instrument dated February 18, 1916, as the last will of Rebecca H. Baker, late of Dennis in the county of Barnstable. An appeal from the decree allowing the will has been taken by an heir at law of the testatrix and is now pending; a certificate under Equity Rule 36 has been issued by the judge of probate, which recites that the matters relied on by the respondent are deemed a proper subject for judicial inquiry before a jury, and issues for a jury have been framed by a justice of this court.

The record shows that the testatrix left an earlier will, dated and executed in the year 1908, but that the petitioners had no knowledge of its existence until after the time for filing an appeal from the allowance of the will of 1916 had expired. It is alleged by the petitioners that the later instrument ought not to be allowed as the last will of the deceased because it was not duly executed

by her while of sound and disposing mind and memory, and because it was obtained by fraud and undue influence. The earlier will was filed in the Probate Court soon after it was found, and a petition for its probate is pending.

At the hearing before the single justice in this case, copies of both wills were offered in evidence, from which it appears that under the will of 1908 the petitioner Susan K. Crowell was bequeathed and devised \$15,000 in money, certain specific articles of personal property, and a woodlot in West Dennis; while under the will of 1916 she was given only a legacy of \$10,000. The petitioner Hiram C. Crowell under the 1908 will was given a legacy of \$1,000, while under the will of 1916 he was to receive nothing. In entering a decree upon the petition the single justice in effect ruled that the petitioners were persons "aggrieved" within the meaning of R. L. c. 162, § 13; and it must be assumed that he found the failure to claim an appeal from the decree of the Probate Court was without default on their part and that justice required a revision of the case. The discretionary power vested in the court under the statute (§ 13) cannot be said to have been improperly exercised in the case at bar. *Hutchings v. Davis*, 232 Mass. 525.

The question remains whether as matter of law the petitioners are persons "aggrieved" as that word is used in the statute; in other words, is a person who is named as a legatee in an earlier will, a person "aggrieved" by the allowance of a later will under which he would take nothing or less than if the earlier will were established?

This precise question presented does not appear to have been decided by this court, although courts in many other jurisdictions have determined that such legatees are entitled to appear and contest the allowance of a later will.

In the case of *Old Colony Trust Co. v. Bailey*, 202 Mass, 283, it was held by this court that legatees are not entitled as of right to petition for the probate of a will. It was said by Chief Justice Knowlton, at page 290, that "It is also true, as a general rule, that the interests of legatees claiming under a will are properly and sufficiently represented by the executor, and . . . individual legatees are not entitled as of right to appear separately and become parties to a petition for the probate of a will. The represen-

tation of the estate and the conduct of the trial usually should be left to the executor. But if it appears that one legatee has important interests adverse to those of the legatees generally, or if for any reason, under the issues submitted to the jury, there are contentions that ought to be made in support of the will which are adverse to other contentions that ought to be made in support of some part of the will, it is in the discretion of the presiding justice to allow parties differently interested to appear and be heard in support of their respective contentions."

That rule does not necessarily apply to a case like the present, where there are legatees under an earlier will whose interests are adverse to the allowance of the later will. If the later will is finally allowed, one of the petitioners will take a substantially smaller portion of the estate of the deceased than she would take if the earlier will were allowed, while the other petitioner will take nothing, although given a substantial legacy in the earlier will. Under these circumstances, it is manifest that the petitioners are "aggrieved" as matter of law if the will as allowed by the Probate Court wrongfully deprives them of what they would otherwise take under the earlier will. It is plain that the executor of the later will cannot properly and sufficiently represent and protect the interests of these petitioners; nor can the executor named in the earlier will protect and represent their interests, as that will has not been allowed, and his petition to be permitted to enter and prosecute an appeal from the allowance of the later will has been denied. *Hutchings v. Davis, supra.*

The rights of the petitioners are not protected by the pending appeal of the heir at law of the deceased: he may properly at any time before the issues have been tried (if he sees fit to do so) waive his appeal, and that will may be finally allowed, thereby leaving the petitioners without opportunity to be heard.

Under statutes generally a proceeding to contest a will can be maintained only by a "person interested" or by a person "aggrieved" at the time the will is admitted to probate. The interest must be a direct pecuniary interest affected by the probate of the will. The interests of the petitioners are such that they may have been found to be persons "aggrieved" by the decree as matter of law. It seems to be settled by the great weight of authority that legatees under an earlier will are entitled to contest

a later will to establish their rights; and no decisions to the contrary have been called to our attention nor have we been able to find any to that effect. *Crowley v. Farley*, 129 Minn. 460. *Kos-telecky v. Scherhart*, 99 Iowa, 120. *In re Wynn's Estate*, 193 Mich. 223. *Wolf v. Bollinger*, 62 Ill. 368. *McDonald v. McDonald*, 142 Ind. 55. *Estate of Langley*, 140 Cal. 126. *Hayle v. Hasted*, 1 Curt. 236. *Urquhart v. Fricker*, 3 Add. Eccl. 56. See cases collected in 40 Cyc. 1241, note. See also *Ensign v. Faxon*, 224 Mass. 145; *Hayden v. Keown*, 232 Mass. 259; *In re Stewart's estate*, 107 Iowa, 117; *Safe Deposit & Trust Co. of Baltimore v. Devilbiss*, 128 Md. 182.

Decree affirmed.

MILDRED P. MILLS vs. W. T. GRANT COMPANY.

RUTH E. GODFREY vs. SAME.

Essex. November 11, 1918. — June 16, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Libel and Slander, Liability of corporation for slander of employee. *Corporation*, Liability in tort.

A corporation is liable for slanderous words uttered by one of its servants in the course of his employment.

TWO ACTIONS OF TORT against the W. T. Grant Company, a corporation conducting a retail store in Lynn. Writs dated February 3, 1916.

Each declaration contained three counts, the first alleging assault, the second false imprisonment and the third slander. In each of the cases the third count was as follows: "The plaintiff says that on or about the fourth day of December, 1915, the agents or servants of the defendant, thereunto duly authorized and in control of the defendant's store situated on Union Street in said Lynn, publicly, falsely and maliciously charged the plaintiff with the crime of larceny by words spoken of the plaintiff substantially as follows: — 'You stole those beads; you took those beads from this store and you know it; you have taken things from this store;' to the damage of the plaintiff in the sum stated in her writ herein."

In each case the answer was a general denial.

In the Superior Court the cases were tried together before *Shattuck, J.* The evidence under the third count is described in the opinion. At the close of the evidence the defendant filed a motion that a verdict be ordered in its favor on the third count, stating in support of its motion the following grounds:

"1. There is no evidence from which the jury could properly find that the defendant authorized its employees to commit the acts complained of.

"2. There is no evidence from which the jury could properly find that the defendant ratified the acts of its agents upon which this action is based."

The judge denied the motion. The defendant then asked the judge to instruct the jury, among other things, as follows:

"3. The defendant is not liable under the count for slander unless the jury find either that the defendant authorized its servants to commit the acts complained of, or that it ratified said acts."

"8. If the jury find that the words set forth in the third count of the plaintiff's declaration were published by the servants of the defendant, the defendant is not liable in the absence of evidence tending to show that said words were uttered by the authority of the defendant corporation or that said corporation had ratified such acts of its servants.

"9. The mere fact that slanderous words were published by an agent or servant of the defendant in the course of his employment, and in reference to the plaintiff, is not sufficient to hold the defendant liable. *Comerford v. West End Street Railway*, 164 Mass. 13."

The judge refused to give any of these instructions, and as to the alleged slander gave to the jury the instruction which is quoted in the opinion.

On the third count the jury returned a verdict for the plaintiff Mills in the sum of \$400 and a verdict for the plaintiff Godfrey in the sum of \$50. In each of the cases the defendant alleged exceptions to the denial by the judge of its motion to order a verdict in its favor on the third count, to the refusal of the judge to give the instructions requested by it as stated above and to the instruction of the judge which is quoted in the opinion. After

the death of *Shattuck*, J., the exceptions were allowed by *Quinn*, J.

The cases were submitted on briefs.

C. N. Barney & W. A. Bishop, for the defendant.

J. W. Sullivan, for the plaintiffs.

LORING, J. These are two actions of slander by different plaintiffs against the same defendant. The cases were tried together. In each case the plaintiff had a verdict. The facts were in substance these: The plaintiffs went to the defendant's store in Lynn to buy Christmas presents. After they had left the store they were followed by one Flora Lipkin employed by the defendant "as a store detective" to "assist in pointing out people who were a 'cause for the enormous shortage in the store'; that she was supposed to watch anybody who 'grabbed anything out of the store without paying for it' and to inform the manager thereof; that it was her business to know whether people had taken anything from the store or not." "At Lipkin's request the plaintiffs returned with her to the store of the defendant and were brought by her to . . . Baldwin, manager of the store; whereupon Lipkin, in the presence of others, accused the plaintiffs of having stolen some beads from a counter in the store, in substantially the words set out in the plaintiff's declaration; and the manager, Baldwin, reiterated the charge against the plaintiffs and made further talk in which he endeavored to induce the plaintiffs to return the beads, which they denied having. The evidence as to the nature of the employment of Baldwin was that he was the manager of the store; that he was in charge there and that there was nobody higher in authority at that time in that particular store." The defendant moved for a verdict in its favor as matter of law and asked for the three rulings which are printed on page 141. The presiding judge instructed the jury that: "The defendant, of course, as a corporation can only do anything through agents or servants, and if these agents or servants of this corporation were doing this in the course of their employment, which is for you to find whether or not they were, then the corporation is responsible." The cases are here on exceptions taken to the refusal of the judge to direct a verdict for the defendant, to his refusal to give the rulings asked for, and to the instructions on the point given in the charge to the jury.

The question raised by these exceptions is a question which was left open by this court in *Comerford v. West End Street Railway*, 164 Mass. 13, 14, *Kane v. Boston Mutual Life Ins. Co.* 200 Mass. 265, 269, and *Economopoulos v. A. G. Pollard Co.* 218 Mass. 294, 297.

In *Comerford v. West End Street Railway*, *ubi supra*, it was said: "Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable; but if they are uttered by an agent or servant in the course of the business in which he is employed, it is at least questionable whether the corporation is liable. We are aware of no case in which this has been held." This question was left open (in *Comerford v. West End Street Railway*) because of the statement on the point made by Mr. Odgers in his treatise on Libel & Slander published in 1881. This is apparent from the defendant's brief among the original papers in that case. Mr. Odgers' statement (at page 368, 1st ed.) is: "A corporation will not, it is submitted, be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words: for a slander is the voluntary and tortious act of the speaker." In the second edition of his book, (published in 1890, five years before the decision in *Comerford v. West End Street Railway*) Mr. Odgers repeated the statement made in the first edition with the omission of the concluding words: "for a slander is the voluntary and tortious act of the speaker," and that statement was repeated in the third edition of his work. There are statements in 18 Am. & Eng. Encyc. of Law (2d ed. published in 1901) 1059, and in 10 Cyc. (published in 1904) 1216, substantially to the same effect.

Townshend on Slander & Libel also is relied on by the defendant in the case at bar. In the first edition (published in 1868) at page 360, Mr. Townshend makes this statement: "As a corporation can act only by or through its officers or agents (§ 261) and as there can be no agency to slander (§ 67), it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong. If an officer or an agent of a corporation is guilty of slander, he is personally liable and no liability results

to the corporation." The same statement is repeated in the second edition (published in 1872) at page 459 and again in the fourth edition (published in 1890) at page 474. It is to be observed that the proposition laid down by Mr. Townshend is quite different from that originally laid down by Mr. Odgers in substance repeated in 18 Am. & Eng. Encyc. of Law (2d ed.) 1059, and in 10 Cyc. 1216. The proposition laid down by Mr. Townshend is that laid down by Lord Bramwell in *Abrath v. North Eastern Railway*, 11 App. Cas. 247, 253, 254. When that proposition was stated by Lord Bramwell in that case it was not concurred in by the Lord Chancellor, Lord Watson or Lord FitzGerald who sat with him at that time. It never became the law of England. See Lord Lindley in *Citizens' Life Assurance Co. Ltd. v. Brown*, [1904] A. C. 423, 426. It is not the law of this Commonwealth. *Reed v. Home Savings Bank*, 130 Mass. 443. Moreover the statement made by this court in *Comerford v. West End Street Railway*, *ubi supra*, page 14, is a statement that that proposition is not law here. In that statement this court said: "Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable."

The distinction put forward originally by Mr. Odgers, (namely, that, although a corporation is liable in slander if the stockholders or directors of the corporation expressly authorize the slanderous words or subsequently ratify them, yet it is not liable if they are uttered by an agent or servant in the course of his employment) was abandoned by him in the end. In the fourth edition of Odgers, Libel & Slander (published in 1905) that statement was omitted. The omission without doubt was due to the decision of the Privy Council in *Citizens' Life Assurance Co. Ltd. v. Brown*, *ubi supra*. Having reference to that case Mr. Odgers (in the 4th ed. at page 553) said: "It has now been decided that a corporation may be rendered liable for words published on a privileged occasion, by proving malice in its servant who published them, provided the servant was acting within the scope of his employment (*Citizens' Life Assurance Co. Ltd. v. Brown*, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. (N. S.) 739; 20 T. L. R. 497)" and the statement here in question made by Mr. Odgers in the earlier editions of his work was omitted.

A corporation being an artificial being can act only by stockholders, officers, agents or servants. It is now settled (contrary to the opinion of Lord Bramwell in *Abrath v. North Eastern Railway*, 11 App. Cas. 247, 253, 254) that a corporation can be made liable for a malicious act on proof which would make an individual liable therefor. It necessarily follows that a corporation is liable in slander if slanderous words are uttered by an officer, agent or servant of a corporation in the course of his employment as well as when slanderous words are uttered by the direct authority of the stockholders or directors. Whether in an individual case action is taken in behalf of a corporation by stockholders or directors or by an officer, agent or servant in the course of his employment is immaterial. In each case the corporation is liable because the act is done by a natural person acting for the corporation.

The reason for the distinction originally put forward by Mr. Odgers and left open in *Comerford v. West End Street Railway*, originally was stated to be: "for a slander is the voluntary and tortious act of the speaker." But in the ordinary case where a corporation is liable for an act done by an agent or employee in the course of his employment, the act of the agent or servant (for which the corporation is liable because it was done in the course of his employment) is a voluntary act. There may be cases in which the act of a servant for which the master is liable is an involuntary act on the part of the servant. But ordinarily the act of the servant for which the master is liable (because it is an act in the course of the servant's employment) is the voluntary act of the servant. Even when the act is intended by the servant to violate the rights of the plaintiff the master is liable if it is done to carry out the duty owed by the servant to his master. *Howe v. Newmarch*, 12 Allen, 49. The fact that the act of uttering the slanderous words uttered by an agent or servant of a corporation in the course of his employment is a voluntary one is no reason for holding that the corporation is not liable therefor.

It seems to have been in the mind of those who have put forward the distinction originally put forward by Mr. Odgers, that such a wrong as a slander cannot in fact be committed by an agent in the course of his employment whether the master is a natural person or a corporation. But that is not so. The case at bar is perhaps as good an instance to the contrary as could

be found. It was in evidence in the case at bar that Mrs. Lipkin was employed "as a store detective . . . to assist in pointing out people who were a 'cause for the enormous shortage in the store'; that she was supposed to watch anybody who 'grabbed anything out of the store without paying for it' and to inform the manager thereof; that it was her business to know whether people had taken anything from the store or not." If Mrs. Lipkin in the performance of that duty thought that the plaintiffs had stolen the beads which she thought they had stolen, the jury were warranted in finding that it was her duty to accuse them of the theft "to induce the plaintiff to return the beads."

The weight of authority is in favor of the ruling made by the presiding judge in the case at bar. There is but one decision of a final court of appeal in favor of the proposition originally put forward by Mr. Odgers, namely, *Behre v. National Cash Register Co.* 100 Ga. 213. In addition to that there is a statement to that effect in *Singer Manuf. Co. v. Taylor*, 150 Ala. 574, 577, 578. But the statement made in that case was not necessary to the decision there made. In that case the agent and the corporation were sued jointly and the statement as to the law of slander (originally put forward by Mr. Odgers) was put forward after the case had been decided on the ground that "the offense of slander is essentially single, differing in this respect from libel." On the other hand it was laid down by the House of Lords in *Glasgow Corp. v. Lorimer*, [1911] A. C. 209; *S. C. sub nom. Riddell v. Glasgow Corp.* [1910] Sess. Cas. 693, that a corporation is liable for words spoken by a servant in the course of his employment. In that case it was held that the words were not uttered in the course of the agent's employment and for that reason the corporation was held not to be liable. It is the settled law of New Jersey (*Empire Cream Separator Co. v. De Laval Dairy Supply Co.* 46 Vroom, 207), Ohio (*Citizens Gas & Electric Co. v. Black*, 95 Ohio St. 42), Minnesota (*Roemer v. Jacob Schmidt Brewing Co.* 132 Minn. 399) and North Carolina (*Redditt v. Singer Manuf. Co.* 124 N. C. 100, by a divided court of three to one; see also *Sawyer v. Norfolk & Southern Railroad*, 142 N. C. 1), that a corporation is liable for slanderous words uttered by one of its servants in the course of his employment. There is a decision by the Circuit Court of Appeals for the Fourth Circuit (*Grand Union Tea Co. v. Lord*, 231 Fed.

Rep. 390) to the same effect. And it was so laid down in *Hopkins Chemical Co. v. Read Drug & Chemical Co.* 124 Md. 210, 212-215; in that case the words uttered were not slanderous *per se* and there being no allegation of special damage the demurrer was sustained.

Moreover we are of opinion that no distinction can be made in this respect between libel and slander. It was decided in *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513, that a corporation is liable for libel where it is proved that the libel was written by a servant or agent of the corporation in the course of the business in which he was employed. See also *Howland v. Blake Manuf. Co.* 156 Mass. 543; *Hill v. Murphy*, 212 Mass. 1, 4.

It follows that the ruling made by the presiding judge in his charge to the jury was right, the rulings asked for were wrong and that the exceptions must be overruled.

So ordered.

NELLIE F. COCHRAN vs. BURNHAM D. BARTON.

SAME vs. EMMA V. GREENLAW.

Suffolk. March 10, 1919. — June 17, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Of one controlling real estate, Snow and ice. *Snow and Ice*.

In an action against the person in control of a house and the surrounding land on a public street in a suburb of Boston, for personal injuries alleged to have been sustained on a day in January from falling on ice alleged to have been formed by water coming from a conductor on the premises of the defendant, it could have been found that the defendant's house was on an embankment about four feet above the grade of the sidewalk, that at the corner of the roof of a piazza of the house was a spout and that from its base extended a wooden trough parallel to the sidewalk and about twelve feet distant from it, measuring on the slope of the embankment. There was evidence that the ice on which the plaintiff slipped was formed from water that came from this trough. *Held*, that the plaintiff was entitled to go to the jury, the fact, that the water that was poured from the spout fell, not upon the sidewalk, but upon the sloping bank some feet back from the street, not being conclusive against the plaintiff.

TWO ACTIONS OF TORT, one against the lessee and the other against the owner and lessor of a dwelling house and the surround-

ing land in the part of Boston called Forest Hills, for personal injuries sustained on January 25, 1917, caused by slipping and falling upon ice on the sidewalk of Wenham Street, a public highway, formed by water alleged to have come from conductors on the premises of the defendants. Writs dated respectively March 16 and March 31, 1917.

In the Superior Court the cases were tried together before *Raymond, J.* The plaintiff contended that the ice was formed by water which came from the roof of the piazza through a conductor and trough and flowed across the lawn to the sidewalk where it froze. The defendants contended that the condition of the sidewalk was due to natural causes for which they were not responsible. No question was raised as to the propriety of the notice given by the plaintiff to each of the defendants nor was any question intended to be raised as to the respective duties or liabilities of the landlord and the tenant. The material facts that could have been found in support of the plaintiff's contention are stated in the opinion.

At the close of all the evidence, the defendants filed a motion that a verdict be ordered for the defendants. The judge thereupon ordered a verdict for each of the defendants, basing his decision upon the fact that there was no evidence whatever of any artificial channel that came nearer than twelve feet to the street either way, and ruled that upon all the evidence the plaintiff had not made out a case. By agreement of the parties he reported the cases for determination by this court, with the stipulation that, if his ordering of the verdicts and his rulings were right, judgments should be entered for the defendants upon the verdicts. If the cases should have been submitted to the jury, judgments were to be entered for the plaintiff in the sum of \$400 and it was agreed as follows: "The question of the liability of one of the defendants, and the lack of liability of the other defendant, is not intended to be raised by this report. And, if the evidence shows that the cases should have been submitted to the jury as against either or both of the defendants, then judgments are to be entered for the plaintiff in the sum of \$400 against both defendants, the plaintiff being entitled to but one satisfaction of judgment in the two cases."

The ordinance of the city of Boston, contained in the Revised Ordinances of 1914, c. 40, § 17, which was introduced in evidence

by the plaintiff, subject to the exception of each of the defendants, was as follows: "No owner or occupant of a building or of land shall suffer sewage or waste or stagnant water to remain in such building or upon such land. No owner or occupant of land abutting on a private passageway and having the right to use such passageway shall suffer any filth, waste, or stagnant water to remain on that part of the passageway adjoining such land. No person shall discharge any waste water or water from a sink or water-closet, except through a drain into a sewer or cesspool or in accordance with a permit from the board of health."

G. H. McDermott, (J. M. Fowler with him,) for the plaintiff.

C. H. McIntyre, (G. W. Abele with him,) for the defendants.

DE COURCY, J. The plaintiff slipped and fell upon the ice while walking on the easterly sidewalk of Wenham Street, Boston, in front of premises of which the defendant Greenlaw was owner and the defendant Barton was lessee. The plaintiff's due care apparently is not in dispute; no question was raised as to the sufficiency of the statutory notice; and it is stipulated in the report that the plaintiff is to have judgment if the evidence entitled her to go to the jury as against either or both of the defendants.

The principle of law on which the plaintiff bases her claim is the familiar one, that a landowner who collects surface water into an artificial channel, such as a spout, and discharges it upon a public way, where it freezes and makes the use of the way dangerous, is the efficient cause in creating a public nuisance, and is liable for damage resulting therefrom to a traveller using due care. *Hynes v. Brewer*, 194 Mass. 435. *Field v. Gowdy*, 199 Mass. 568. *Drake v. Taylor*, 203 Mass. 528. *Marston v. Phipps*, 209 Mass. 552.

In support of the plaintiff's contention there was evidence from which the jury could find the following facts: The land of the defendants has a frontage of forty-five feet on Wenham Street, and there is a drop of three feet in the grade from the southerly end, at Sunset Avenue, to the northerly end of the lot. The house is on an embankment about four feet above the grade of the sidewalk. At the southwesterly corner of the piazza roof is a conductor, and from its base a V-shaped wooden trough extends parallel with and to a point about twelve feet distant from the sidewalk

of Wenham Street, measuring on the slope of the embankment. There was no ice on the sidewalk at noon, but in the evening there was a strip or ridge of rough ice about fifteen feet in length, and from six inches to two feet wide. It began at the foot of the bank, and widened as it went down hill. There was also ice on the bank, extending from this ridge on the sidewalk all the way up to the "drain pipe."

In our opinion the evidence entitled the plaintiff to go to the jury on her contention that the ridge of ice on the sidewalk was formed by water which was collected in the conductor. The fact that it was poured from the spout, not directly upon the sidewalk but upon the sloping bank some feet back from the street is not conclusive against the plaintiff. In *Field v. Gowdy, supra*, one of the spouts was about eleven feet from the street line. It is true that there the water reached the way over a concrete walk, while here it followed the natural grade of the embankment. But it is equally a question of fact for the jury whether the plaintiff connected the ice on the sidewalk with the water poured from the conductor. In view of this conclusion we do not find it necessary to consider the admissibility and effect of Revised Ordinances, c. 40, § 17, dealing with the discharge of waste water.

It follows that, in accordance with the terms of the report, "judgments are to be entered for the plaintiff in the sum of \$400 against both defendants, the plaintiff being entitled to but one satisfaction of judgment in the two cases."

Ordered accordingly.

AINSWORTH MANSON & another vs. BRIDGET M. FLANAGAN.

Middlesex. March 13, 1919. — June 17, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Contract, Consideration. Mechanic's Lien.

A contractor had made an agreement with a landowner to build a house on his land for \$7,000 and to furnish all the material and labor, and a subcontractor, who had agreed with the contractor to do the stair work for the house, furnishing labor and material for an entire price of \$120, made a demand upon the contrac-

tor for payment within thirty days from the completion of his work, and, payment having been refused, gave notice to the landowner that he intended to enforce a mechanic's lien on the property unless the landowner paid his bill, whereupon the landowner agreed in writing to pay to the subcontractor the amount due on the subcontract for the stair building, although the subcontractor gave no notice of an intention to claim a lien for materials. In an action by the subcontractor against the landowner on this contract, there was evidence that the value of the labor alone could be distinctly shown and that, at the time when the defendant agreed to pay the plaintiff's bill, the plaintiff could have filed a valid lien for the labor performed or furnished under his contract, although the value of the labor formed but a small part of his entire claim. After a verdict for the plaintiff, it was *held* that under R. L. c. 197, § 2, a lien for labor only could have been enforced against the defendant's property, and that the plaintiff's forbearance to enforce his claim for the labor was a valid consideration for the defendant's promise, the mere inadequacy of the consideration, in the absence of fraud, being no defence to an action on the defendant's promise to pay the plaintiff's whole claim.

CONTRACT by the members of a partnership engaged in the business of stair builders, under the firm name of Manson and MacPhee, on a contract in writing to recover the sum of \$120 as the contract price for certain stairs set into the defendant's house by the plaintiffs under a contract with one Louis Fisher, who had agreed to build a four-family house for the defendant on Willow Street in Waltham. Writ dated March 17, 1916.

The contract sued upon was as follows:

"Allston, Mass., Oct. 21 1915

Tel., Brighton, 161

Mr. Lewis Fisher Co

To Manson & MacPhee, Dr.

Stair Builders

[Cut of Stairs] Piazza Stock, Mantels, Cabinet Work, Etc.

124 Western Avenue, Allston, Mass.

to Stairs in Willow St. House 120 00

I have to agree to pay your money this day October 26.

Mrs Flanagan

Bellevue 656-W

Ainsworth Manson"

In the Superior Court the case was tried before *Lawton*, J. Ainsworth Manson, one of the plaintiffs, testified that he and MacPhee had been in partnership as stair builders for about five years; that he did not make the contract with Fisher; that the contract with Fisher was made by his partner, MacPhee; that the

work was finished on September 28, 1915, that his partner told him to go to the defendant for the money; that he called on her several times between September 28, 1915, and October 26, 1915; that on October 26, 1915, he told the defendant that his time had run out; that the only thing he could do, having a claim on the house, was to get a mechanic's lien; that he said to her, "That won't hurt your property or hurt you any. You can release that afterwards;" that she said, "Well, I will go up to see Mr. Burns;" that they went but that Mr. Burns was not at home; that he told her she would have to sign a paper agreeing to pay for the stairs furnished on the contract between Manson and MacPhee and Fisher, or that he would put a mechanic's lien on her house and that she would have to sign before the next day or the lien would be put on; that she did sign on October 26, 1915, so that no lien would be placed by Manson and MacPhee upon her property.

The defendant testified that she made a contract with Louis Fisher to build for her a four-family house for \$7,000, which was to include labor, materials, etc., and that Fisher was to complete the house for that price; that she had made no agreement with the plaintiffs in regard to the stairs; that Manson called on her several times and asked her to pay for the stairs and that on October 26, 1915, Manson called and threatened to put a mechanic's lien on her property unless she signed a paper agreeing to pay for the stairs and that she must sign at once or he would put on a lien and that on October 26, 1915, she signed the paper.

Other evidence is described in the opinion.

At the close of all the evidence the defendant asked the judge to rule as follows: "The contract for the stairs and labor to put them in place having been an entire contract and the plaintiffs not having been able to distinctly show the value of the labor and not having given notice in writing before furnishing the materials to the owner of the property to be affected by the lien that they intended to claim such lien—the plaintiffs had no lien legally enforceable against the defendant at the time the defendant signed the paper and so there was no consideration for her agreement to pay them the amount they claimed."

The judge refused to make this ruling, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$135. The defendant alleged exceptions.

The case was submitted on briefs.

J. J. Burns, for the defendant.

I. M. Huggan, for the plaintiffs.

CARROLL, J. The defendant made a contract with Louis Fisher to build a four-family house for the sum of \$7,000. Fisher was to furnish all material and provide all the labor. The plaintiffs agreed with Fisher to do the stair work on the premises, furnishing labor and material for the entire price of \$120. This work was completed September 28, 1915; demand for payment was made on Fisher, and refused. Within thirty days from the completion of the work, on October 26, 1915, one of the plaintiffs called on the defendant and informed her that he would place a lien on the premises unless she agreed to pay their claim. Thereupon the defendant agreed in writing to pay the amount due on the contract. The plaintiffs gave no notice of their intention to claim a lien for material. The jury found for the plaintiffs.

It is provided by R. L. c. 197, § 2, that "If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price, a lien for the labor alone may be enforced, if the value of such labor can be distinctly shown; but it shall not be enforced for an amount greater than the entire contract price." Under this section a subcontractor may maintain a lien for labor if its value can be distinctly shown, even if the contract was entire and there was an entire price for both labor and material, and although no notice of an intention to claim a lien for material was given. *Casey v. Weaver*, 141 Mass. 280. *Moore v. Erickson*, 158 Mass. 71. *Scannell v. Hub Brewing Co.* 178 Mass. 288, 292.

There was evidence that the value of the labor could be distinctly shown; and that at the time when the defendant agreed to pay the plaintiffs they could have filed a valid lien for the labor performed or furnished, under their contract, in the erection of the building. The defendant's promise to pay the plaintiffs was based upon a legal consideration; and, although the lien could be enforced for the labor only and the value of the labor formed but a small part of the entire claim, the mere inadequacy of the consideration, in the absence of fraud, is no defence to the plaintiff's right to recover. *Dean v. Carruth*, 108 Mass. 242.

Exceptions overruled.

ALFRED A. WHITMAN vs. THOMAS J. FOURNIER & trustees.

Suffolk. March 13. — June 17, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Lottery. Voting Contest. Bills and Notes, Validity, Holder in due course. Practice, Civil, Requests and instructions. Words, "Lottery."

A "voting contest," so called, conducted by a merchant, whereby to purchasers of merchandise at his store he gave blank votes which they could use for themselves or deliver to others, and to the persons whose names received the highest number of votes he gave prizes, all persons concerned knowing in advance that the contestants having the most votes at the end of the contest would be entitled to the prizes and the only way to procure the votes being by purchasing goods of the defendant or by procuring them from other contestants, is not a "lottery" nor within the prohibitions of R. L. c. 214, § 7.

A promissory note, payable in instalments and given for merchandise to be used in carrying on a voting contest as above described and to one who promoted the contest for the merchant, is not invalid.

In an action against the merchant by or in behalf of an indorsee of the promissory note above described, it appeared that the note was indorsed and delivered for value before maturity to one who, under an agreement with the payee, already had advanced money to him on account of other such notes, but it did not appear that the indorsee knew anything of the prize contest; and it was held, that the indorsee, being a holder in due course, could recover on the note even if the voting contest were tainted with illegality.

A request for an instruction to a jury, which is framed in an argumentative form and emphasizes facts selected by the party making the request in his interest, need not be granted.

CONTRACT for instalments alleged to be due upon a promissory note of the defendant to Thomas Howard Company, described in the opinion, alleged to have been indorsed to Knauth, Nachod and Kuhne, bankers, for value and before maturity, and by them indorsed to the plaintiff for the purposes of this action. Writ in the Municipal Court of the City of Boston dated January 24, 1914.

Upon removal to the Superior Court, the action was tried before Fox, J. The general features of the "voting contest" referred to in the opinion were that purchasers of goods at the defendant's store were given blank votes under certain rules and conditions, which they could use for themselves or transfer to others, and

which were cast to be counted by judges appointed by the defendant. The person whose name received the highest number of votes was entitled to receive a piano and others received other prizes. The merchandise used as prizes was purchased with the note which is the subject of this action.

The testimony referred to in the opinion as in the deposition of Knauth, a member of the firm of bankers to whom the note was indorsed by the payee, was as follows: "The original note was indorsed and delivered by Thomas Howard Company to Knauth, Nachod and Kuhne on the twenty-eighth day of May, 1913, and Knauth, Nachod and Kuhne paid therefor on the thirteenth day of June, 1913, to Thomas Howard Company the sum of \$240." It further appeared by this deposition that Knauth, Nachod and Kuhne had entered into an agreement with the Thomas Howard Company previous to this transaction to advance to the Thomas Howard Company sixty per cent of such installment notes as should be presented to them for that purpose, that under this agreement they had advanced the sum of \$49,726 previous to the transfer to them of the note in suit, that at the time of such transfer there was unpaid on the entire amount of their advances the sum of \$38,894, that after such transfer, and up to the time of the depositions, they advanced \$8,135, and that at the time of the depositions there was due them from Thomas Howard Company about \$2,250. Thomas Howard Company made to Knauth, Nachod and Kuhne at the time of the transfer of the note in suit a collateral stock note, so called, which made no mention of any voting contest.

The deposition of Knust, referred to in the opinion, who was advance loan clerk in the employ of Knauth, Nachod and Kuhne, corroborated the testimony of Knauth and contained this language relative to the indorsement upon the note: "The original promissory note, . . . was indorsed and delivered by Thomas Howard Company to Knauth, Nachod and Kuhne on the twenty-eighth day of May, 1913, and Knauth, Nachod and Kuhne paid therefor the sum of \$240 on the fifteenth day of June, 1913."

Other material evidence is described in the opinion.

At the close of the evidence, the defendant requested the judge to instruct the jury as follows:

"If the scheme was to set up a prize contest over the piano and the defendant was induced to give his note for \$400, said note

would be void as between Thomas J. Fournier and the Thomas Howard Company, yet if any subsequent party took said note by indorsement or assignment under such facts and circumstances as would put a prudent man of business on inquiry as to the inception of said note, such party would be chargeable with full notice of the scheme and would not be entitled to recover against the defendant in this action."

"In passing upon this question you are authorized to take into consideration all the facts and circumstances connected with the case, the fact that the Knauth, Nachod and Kuhne name appears upon the face of the note and further that the note has been apparently detached from the contract entered into between Thomas Howard Co. and Thomas J. Fournier and whether this banking concern would be likely to advance any money on a note secured from the defendant without fully informing itself of the conditions and contract under which the note was secured and the fact that neither Howard nor one of the bankers nor the plaintiff himself comes here to testify."

The requests were refused and the judge instructed the jury in substance that it was for them to decide upon the evidence introduced whether the indorsement of the name of the payee upon the note in suit was genuine. He further instructed them that the prize contest did not constitute a lottery. The defendant excepted to the refusal of the requests for instructions and to the instruction above described.

The jury found for the plaintiff in the sum of \$270; and the defendant alleged exceptions.

R. L. c. 214, § 7, is as follows: "Whoever sets up or promotes a lottery for money, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids either by printing or writing, or is in any way concerned, in the setting up, managing or drawing of such lottery, or in such disposal or offer or attempt to dispose of property by such chance or device, shall for

each offence be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year."

J. M. Browne, (*J. T. Maguire* with him,) for the defendant.

H. C. Dunbar, for the plaintiff.

DE COURCY, J. The defendant purchased by a conditional bill of sale from Thomas Howard Company (not incorporated) a piano, fourteen dozen assorted pieces of silverware, and some advertising literature, intending thereby to carry on a voting contest in his store, for the purpose of increasing his business. He also signed an instalment promissory note for \$400 in payment for the goods. Howard indorsed and delivered the note to Knauth, Nachod and Kuhne, bankers, as security for a loan; and later they assigned it to the plaintiff, to enable him to bring this action thereon to enforce collection. A verdict was rendered for the plaintiff for the balance due, with interest.

The contention of the defendant is that the note was given to promote a lottery. We assume, in his favor, that this question was raised by his first request and by his exception to the judge's instruction to the jury, that this prize contest did not constitute a lottery. Our statute which prohibits the disposing of any property of value by way of lottery, (R. L. c. 214, § 7,) does not attempt to define the word. But, as was said in *Commonwealth v. Mackay*, 177 Mass. 345, 346: "Both in the popular and legal sense, the word 'lottery' signifies a scheme for the distribution of prizes by chance." For various definitions formulated by lexicographers and courts see Cent. Dict.; Bouvier's Law Dict.; 17 R. C. L. 1209; 3 Words & Phrases, (2d ser. 191.)

While some of the methods suggested for conducting the piano contest may well be criticized, so far as appears there was no gambling element of lot or chance in the transaction, and no evidence on which the jury would be warranted in finding that essential element. See *Commonwealth v. Sullivan*, 146 Mass. 142; *Commonwealth v. Sisson*, 178 Mass. 578; *Opinion of the Justices*, 226 Mass. 613, 616. All persons concerned knew in advance that the contestant having the most votes at the end of the contest would be entitled to the piano or other prize. The only way to acquire those votes was by purchasing the merchandise of the defendant, or by procuring them from other contestants.

Further, it does not appear that the bankers knew anything

about the prize contest; and even if the transaction were tainted with illegality, that would not prevent recovery on the note by an innocent holder for value. *Fuller v. Hunt*, 182 Mass. 299.

The judge was not bound to adopt the language of the defendant's second request, which was framed in an argumentative form and emphasized facts selected in his interest, *Altavilla v. Old Colony Street Railway*, 222 Mass. 322; and it is to be presumed that appropriate instructions were given to the jury.

Assuming that the genuineness of the indorsement of the payee was put in issue by the defendant's answer (see R. L. c. 173, § 86; *Whiddon v. Sprague*, 203 Mass. 526), there was ample evidence to establish it in the depositions of Knauth and of Knust.

Exceptions overruled.

LUIGI PIANTADORI vs. MARY A. NALLY & others.

Middlesex. March 14, 1919. — June 17, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Attachment, Of real estate standing in name of another.

If the holder of the title to certain real estate delivers a deed of it to one who does not record the deed, but who at once as part of the same transaction executes and delivers a deed of the premises to a third person, and it does not appear that the record title was retained in the first holder for the purpose of securing the land from attachment or for the purpose of delaying, defeating or defrauding creditors, an attachment of the land thereafter made in an action against the first grantee, as land of the first grantee standing in the name of the record holder of the title, is ineffectual, and a purchaser at an execution sale after a levy following a judgment in such action receives no title either under the provisions of R. L. c. 167, § 63, or of R. L. c. 178, § 1, because at the time of the attachment the land described was not "the land of [the] debtor."

WRIT OF ENTRY in the Land Court, dated June 24, 1918.

The tenants were Mary A. Nally, Annie E. Nally and Edwin L. Stone. Stone filed a disclaimer. The case was heard in the Land Court by Davis, J., who made findings of fact in substance as follows:

The demanded premises were owned in 1915 by the tenant Mary.

Previous to September of that year she executed a deed conveying them to her daughter, the tenant Annie, but the deed was not recorded. In September the premises were taken on an execution obtained against Mary and were sold to the tenant Stone. On May 29, 1917, in an action of contract by this demandant against Mary, upon a special precept an attachment of the "estate of the said Mary A. Nally standing in the name of Edwin L. Stone" was made, as described in the opinion, and was followed by a sale on execution to the demandant, as also there described. The tenant Annie E. Nally is the daughter of the tenant Mary. At the time the special precept was taken out the counsel for the demandant was advised from an examination of the records that there was no real estate standing in the name of Mary A. Nally, but that the demanded premises were then standing in the name of Stone under the execution sale. The time for redemption had then expired. He ascertained from Stone, however, that his debt had been paid in full and that he had reconveyed the property to Mary. At the same time that the demanded premises were reconveyed from Stone to Mary, a deed was executed conveying them from Mary to Annie, but neither deed was recorded until March 30, 1918, when they were recorded together. The deeds from Stone to Mary and from Mary to Annie were simultaneous and formed a part of one transaction. The counsel for the demandant, although he knew of the unrecorded deed from Stone to Mary, did not know of the unrecorded deed from Mary to Annie.

"I do not find that the title to the demanded premises was retained in said Stone either for the purpose of fraudulently securing the land from attachment, or for the purpose of delaying, defeating or defrauding creditors. When a reconveyance was obtained from Stone it could easily have been made direct to the said Annie. Full value was paid for it. It is, of course, possible that the deeds were kept off of the records and the title left in Stone's name for the purpose of defrauding creditors of both Mrs. Nally and her daughter, but there is no evidence before me that would cause me to so find."

The judge ruled that the attachment, levy of execution and sale were valid and judgment was entered for the demandant. The tenants Mary A. and Annie E. Nally appealed.

The case was argued at the bar in March, 1919, before *Rugg, C. J., Loring, De Courcy, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the justices.

B. F. Murphy, for the tenants.

No counsel appeared for the demandant.

DE COURCY, J. Piantadori sued Mary A. Nally in an action of contract, and on May 29, 1917, a special precept issued for an attachment of the "estate of the said Mary A. Nally standing in the name of Edwin L. Stone." Attachment was thereupon made of all right, title and interest the said Mary A. Nally had on that date in and to any and all real estate in the county of Middlesex, and also of "the following described real estate, the record or legal title to which now stands in the name of Edwin L. Stone, to wit," the demanded premises, particularly described. The demandant obtained judgment in that action, execution was levied on all the right, title and interest which Mary A. Nally had in said real estate at the time of the attachment; and Piantadori was the purchaser at the execution sale on April 27, 1918. Later he brought this writ of entry against Edwin L. Stone, Mary A. Nally and Annie E. Nally. The tenant Stone filed a disclaimer. In the Land Court judgment was entered for the demandant; and the case is here on the appeal of the other tenants.

At the time of the attachment from which the demandant derives his rights, the record title to the property in question was in said Stone, and had been since September, 1915. Counsel for Piantadori ascertained from Stone that he had conveyed the locus to Mary A. Nally. The date of this deed does not appear; but a deed was executed at the same time conveying the premises from said Mary A. to said Annie E. Nally. These deeds were not recorded until March 30, 1918.

It would seem that the special attachment in question was made in accordance with the provisions of R. L. c. 167, § 63, on the assumption that the title was retained in Stone with the intent and for the purpose of fraudulently securing the property from attachment by a creditor of Mary A. Nally. That contention is now disposed of by the decision of the judge of the Land Court: "I do not find that the title to the demanded premises was retained in said Stone either for the purpose of fraudulently securing the

land from attachment, or for the purpose of delaying, defeating or defrauding creditors."

According to the interpretation of the Land Court, the attachment, levy and sale as authorized and actually made were all made directly on the land of the debtor under the authority of the first part of R. L. c. 178, § 1. See *Cunningham v. Bright*, 228 Mass. 385. Assuming this interpretation of the "special" attachment to be correct, the difficulty with the judge's conclusion is that the locus was not "the land of [the] debtor," Mary A. Nally. Neither on the face of the records nor in fact did she have anything to attach. *Cowley v. McLaughlin*, 141 Mass. 181. The property was actually owned by Annie E. Nally. It is true that by virtue of R. L. c. 127, § 4, a creditor of Stone, without actual notice of the unrecorded deeds, could have attached the land as Stone's property. *Woodward v. Sartwell*, 129 Mass. 210. See *Coffin v. Ray*, 1 Met. 212. And the demandant's actual notice of the unrecorded deed to Mary A. Nally would have precluded him from acquiring title by attachment on a claim against Stone the record owner. His ignorance of the unrecorded deed to Annie E. Nally does not entitle him by virtue of this statute to take her property in payment of his claim against Mary A. Nally, who then had no title to or attachable interest in the property, on the face of the records or otherwise. She had been a mere conduit to pass the title; and whatever interest she acquired by the deed from Stone she had parted with by her deed to Annie E. Nally, who purchased the property without fraud and for full value prior to the attachment in question. The purpose of R. L. c. 127, § 4, was to give the sanction of enactment to the rule already adopted by judicial decisions. *Dole v. Thurlow*, 12 Met. 157, 164. And as was said in *Lawrence v. Stratton*, 6 Cush. 163, 167, where the history of this statute is traced, ". . . the sole or at least the main object of the registration of deeds was to give constructive notice of such conveyances to purchasers and creditors, having a purpose to acquire title to an estate by conveyance or attachment; and, therefore, if a purchaser or creditor should attempt to acquire title to the estate by purchase or attachment, having actual notice of the prior deed, unrecorded, it would be a fraud upon the holder of such prior deed, to attempt to defeat it, by setting up his junior recorded deed; which the law would not allow, and so such notice was held to be an exception to the statute."

The present case cannot be distinguished from *Haynes v. Jones*, 5 Met. 292. As the ruling of the Land Court in favor of the defendant was wrong, the appeal must be sustained, and judgment entered for the tenants.

So ordered.

FRANK N. WEST vs. NEW YORK, NEW HAVEN, & HARTFORD
RAILROAD COMPANY.

Suffolk. December 4, 1918. — June 18, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & PIERCE, JJ.

Jurisdiction. Venue, Federal control of local action. *Evidence*, Judicial notice.

Judicial notice will be taken of the provisions of the proclamation of the President of the United States, issued on December 26, 1917, appointing a director general of railroads under the joint resolutions of Congress of April 6 and December 7, 1917, and the first section of the act of Congress approved August 29, 1916, (U. S. St. 1916, c. 418, § 1).

Upon a report by a judge of the Superior Court for determination of the correctness of a ruling by him overruling a plea in abatement to an action of contract begun on April 6, 1918, against the New York, New Haven, and Hartford Railroad Company, the plea setting up in substance that the action was brought in the county of Suffolk, whereas, under "General Order No. 18-A, signed by W. G. McAdoo, Director General of Railroads," it should have been brought either in the county of Dukes County, where the plaintiff resided, or in the State of Connecticut, where the cause of action arose, this court will take judicial notice of the date and of certain provisions of "General Order 18-A," although they are not included in the record nor called to the court's attention by the counsel for the parties.

"General Order 18-A," above described, not having been issued until after the commencement of the action in which the plea in abatement was filed, its provisions could not be relied on in support of the plea.

It appearing that no attachment of property was made in the action in which the plea in abatement above described was filed, so that there was no violation of the proclamation of the President of the United States, above described, which prohibited such an attachment, it was held that the bringing of the action in the county where the defendant had a usual place of business violated no federal enactment applicable to the circumstances, and that the plea properly was overruled.

CONTRACT for breach of an alleged agreement by the defendant to employ the plaintiff as a guard during the duration of the war. Writ dated April 6, 1918.

The plaintiff was alleged in the writ to be of Vineyard Haven in the county of Dukes County, and the defendant to be a corporation having a usual place of business in Boston. The writ was returnable in the county of Suffolk.

The defendant filed a plea in abatement reading as follows:

"And now comes the defendant in the above entitled action and says that the plaintiff at the time the suit was brought was residing in Vineyard Haven in the County of Dukes and Commonwealth of Massachusetts, and that the cause of action, if any, accrued in the State of Connecticut; that by General Order No. 18-A, signed by W. G. McAdoo, Director General of Railroads, it is ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; and, therefore, the defendant ought not to be held to answer to the plaintiff's writ."

Neither the date nor any other of the provisions of "General Order No. 18-A," referred to in the plea, than that there stated, was stated in the record.

In the Superior Court, the plea was heard by *J. F. Brown, J.*, who overruled it "on the ground that the federal government is without authority to regulate procedure in the courts of the various States," and, being of the opinion that the ruling so affected the rights of the parties to the controversy that the matters involved therein ought, before further proceedings, to be determined by this court, reported the question for that purpose, it being stipulated that, if the ruling was right, the defendant should be ordered to answer over, and, if the plea in abatement should be found to be a good defence, that the action should be dismissed.

S. L. Whipple, W. R. Sears & H. W. Ogden, for the plaintiff, submitted a brief.

J. H. Powers, for the defendant.

BRALEY, J. The defendant's contentions, that the United States unless it consents cannot be impleaded in any court either federal or State, and whether the sovereignty is a party to the litigation is not determined by the nominal party shown by the record but by the effects of the judgment which can be entered, may be con-

ceded as being beyond the pale of successful contradiction. *Public Service Commissioners v. New England Telephone & Telegraph Co.* 232 Mass. 465. But the plea in abatement on which it relies to defeat the action recites that the plaintiff at the time the suit was brought resided in "the County of Dukes and . . . that the cause of action, if any, accrued in the State of Connecticut; that by General Order No. 18-A, signed by W. G. McAdoo, Director General of Railroads, it is ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose; and therefore, the defendant ought not to be held to answer to the plaintiff's writ." The cause of action according to the declaration accrued July 14, 1917, when the plaintiff who is alleged to have been employed as a guard for the duration of the war was discharged while on duty at the "Connecticut River Bridge," because his services were no longer required by the defendant. The right to damages for breach of this contract is a vested right of property enforceable under the order in the Superior Court for the "County of Dukes County" where in contemplation of law he had his residence. *Bogni v. Perotti*, 224 Mass. 152. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 151 U. S. 1. *Reeder v. Holcomb*, 105 Mass. 93. *Hazard v. Wason*, 152 Mass. 268.

The trial court under R. L. c. 167, § 14, even if the plea were adjudged good, and this court under St. 1913, c. 716, § 3, could on the plaintiff's motion order the case transferred to the proper county where it could be prosecuted as if duly begun therein and all previous proceedings regularly taken would thereafter be valid.

The presiding judge however overruled the plea "on the ground that the federal government is without authority to regulate procedure in the courts of the various States" and reported the case under the stipulation "that if the ruling is right the defendant be ordered to answer over; and if the plea in abatement be found to be a good defence, that the action be dismissed." See, in this connection as to procedure, R. L. c. 173, § 96, as amended by St. 1906, c. 342, § 2, and St. 1910, c. 555, § 4; R. L. c. 173, § 105, as amended by St. 1910, c. 555, § 5. *Cotter v. Nathan & Hurst Co.* 211 Mass. 31.

It therefore becomes necessary to decide whether the order of the Director General deprived the court when sitting for Suffolk County of jurisdiction. The President's proclamation, appointing a director general of railroads under the joint resolutions of Congress passed April 6, 1917, December 7, 1917, and § 1 of the act approved August 29, 1916, was issued December 26, 1917.

The joint resolution of April 6, 1917, reads: "That the state of war between the United States and the Imperial German Government which has been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." The joint resolution of December 7, 1917, resolved: "That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States." And by § 1 of the act approved on August 29, 1916, "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purpose connected with the emergency as may be needed or desirable."

The proclamation among other provisions contains a clause that "Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judg-

ments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine."

The proclamation does not purport to limit or restrict the right to bring suit on causes of action then existing until the Director General may by general or special order otherwise determine. It is plain in the absence of such order by the Director General that only the rights of attachment on mesne process and of levy on execution are suspended. While on the record at the date of the plaintiff's writ, April 6, 1918, the Director General apparently had taken full possession and control of the defendant's railroad, the date of the order relied on does not appear. But the President's proclamation is a public act of which all courts are bound to take judicial notice and to which all courts are required to give effect. *Armstrong v. United States*, 13 Wall. 154. And the President may direct and empower as in the case at bar a representative to carry out the powers conferred upon him by Congress. The act of the representative is the act of the President. *Wilcox v. Jackson*, 13 Pet. 498. *Williams v. United States*, 1 How. 290.

We accordingly take notice of the general orders promulgated by the Director General in so far as they are applicable to the present case even if they have not been called to our attention by counsel. *Brown v. Piper*, 91 U. S. 37, *Jones v. United States*, 137 U. S. 202, *Jenkins v. Collard*, 145 U. S. 546, 15 R. C. L. Judicial Notice, § 40, and cases cited in notes 11, 12 and 13. Wigmore on Ev. § 2565. It is settled that notwithstanding its previous delegation of the powers enumerated in the resolves and the statute referred to in the proclamation, Congress in the exercise of its general legislative authority could further provide by any appropriate enactments for the operation of the systems of railroad transportation undertaken pursuant to the proclamation. *M'Culloch v. Maryland*, 4 Wheat. 316, 421. *Miller v. Mayor of New York*, 109 U. S. 385. *Juilliard v. Greenman*, 110 U. S. 421. *Logan v. United States*, 144 U. S. 263.

By U. S. St. 1918, c. 25, entitled "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," it is declared by § 10, "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,

except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control. . . .”

The Director General on April 9, 1918, issued the following order: “Whereas the Act of Congress approved March 21, 1918 [c. 25], entitled, ‘An Act to provide for the operation of transportation systems while under Federal control,’ provides (sec. 10), ‘That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or with any order of the President. . . . But no process, mesne or final, shall be levied against any property under such Federal control’; and

“Whereas it appears that suits against the carriers for personal injuries, freight and damage claims are being brought in States and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the Government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not

necessary for the protection of the rights or the just interests of plaintiffs;

"It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides or in the county or district where the cause of action arose."

The last paragraph of this order was amended by a general order dated April 18, 1918, designated as 18-A which previously has been quoted. It is to be noticed that the order as amended is based on the act of Congress of March 21, 1918, but the authority of the Director General to act rests on his appointment by the President.

It is manifest, although no attachment or levy can be made, that neither the resolution, the proclamation thereunder, nor the subsequent statute prohibits actions for damages in accordance with the civil procedure prescribed by the States. The order of the Director General having been issued after the plaintiff's action had been begun is therefore inapplicable and the plaintiff could resort to any court of competent jurisdiction for redress although no attachment on mesne process could be made, and if he obtained judgment no execution could be levied on the defendant's property.

It follows that, his cause of action being transitory and not local, the plaintiff can bring suit in this county where the defendant has a usual place of business and under the terms of the report the defendant is to answer over. R. L. c. 167, § 1.

So ordered.

GERRY L. BROOKS vs. VOLUNTEER HARBOR NO. 4, AMERICAN ASSOCIATION OF MASTERS, MATES & PILOTS.

Suffolk. March 2, 1919. — June 18, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Attorney at Law. Contract, Validity.

An attorney at law, who is a member of the bar of another State but not of Massachusetts, may recover the value of professional services rendered in this Commonwealth to a client here, where it appears that, in rendering the services, he did not hold himself out as lawfully qualified to practice in the courts of this Commonwealth.

CONTRACT for \$754.61, for services and expenses as an attorney at law. Writ in the Municipal Court of the City of Boston dated August 13, 1917.

The defendant, by an amended answer, alleged that, at the time the services are alleged to have been rendered, the plaintiff "was not admitted to practice law in this Commonwealth in accordance with the provisions of the Revised Laws and statutes in amendment thereof."

On removal to the Superior Court, the action was tried before *McLaughlin*, J. The material evidence and the exceptions by the defendant are described in the opinion. The jury found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

C. W. Rowley, for the defendant.

C. L. Favinger, for the plaintiff.

CARROLL, J. The plaintiff, a member of the bar of the State of Maine but not admitted to practice in the courts of this Commonwealth, sued to recover for legal services rendered to the defendant. There was evidence that he had acted, to a limited extent, as attorney of the National Association of Masters, Mates and Pilots, and while so acting had business relations with the defendant, a local harbor or chapter of the National Association.

The plaintiff testified that, at the request of the defendant's secretary, he came to Boston and met some of its officers, who sought his advice respecting a suit brought against the defendant and some of its members, pending in the Superior Court for the county of Suffolk; that he informed the defendant he was not admitted to practice in the courts of this State and it would be necessary to employ local counsel; and that on being authorized to do so, he secured the services of a Massachusetts firm of attorneys, who appeared of record in the case and conducted the defence. The defendant's answer alleges that the plaintiff was not admitted to practice law in this Commonwealth. There was evidence that the plaintiff was regularly employed by the defendant and performed services. The jury found for the plaintiff.

The only question open on this record is whether the plaintiff is prevented from recovering because not admitted to practice law in the courts of this Commonwealth. R. L. c. 165, § 45, as amended by St. 1914, c. 432, provides: "Whoever, not having been

admitted to practice as an attorney at law in accordance with the provisions of this chapter, represents himself to be an attorney or counsellor at law, or to be lawfully qualified to practice in the courts of this Commonwealth, by means of a sign, business card, letter head or otherwise," shall be punished as provided in this section.

There was evidence that the plaintiff in no way held himself out as lawfully qualified to practice in the courts of Massachusetts, that he informed the defendant he "was not admitted in the State court," and it would be necessary for it to have local counsel. The jury were carefully instructed on this point. They were told that it was for them to decide upon the evidence whether the plaintiff pretended that he had a right to appear for the defendant in the Superior Court. By their finding the jury decided that the plaintiff did not violate this statute.

The cases of *Browne v. Phelps*, 211 Mass. 376, and *Ames v. Gilman*, 10 Met. 239, are not applicable. In the first case the plaintiffs were partners; one member of the firm, who was not admitted to practice law in this Commonwealth, represented that he was an attorney and counsellor at law lawfully qualified to practice. In *Ames v. Gilman*, the plaintiff held himself out as an attorney at law, although not authorized to practice in this Commonwealth. In the case at bar, the plaintiff performed legal services for the defendant at its request, although a member of the bar of another State; we see nothing in the evidence to prevent him from recovering a reasonable compensation for the services so rendered.

There was no error in the charge of the presiding judge. The jury were told the plaintiff could not recover if he pretended to be an attorney or attempted to practice law while falsely representing he was authorized to practice; but that it was not a violation of law for a member of the bar of another State to consult with clients in Massachusetts or to perform legal services for them. The defendant's requests were properly refused.

Exceptions overruled.

NEW ENGLAND SANITARIUM vs. INHABITANTS OF STONEHAM.

Middlesex. January 6, 1919. — June 19, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Tax, Exemption. Corporation, Charitable. Words, "Nervous diseases."

If the personal property and real estate of a charitable corporation is used and occupied by it for the treatment of persons, not indigent, who are suffering from mental or nervous diseases or weakness falling short of insanity and not necessarily finding their appropriate treatment in institutions where the insane are confined, said property is being used "for the treatment of mental or nervous diseases" within the meaning of those words as used in St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, and is subject to taxation.

A charitable corporation in a catalogue stated as follows under the caption, "Diseases of the nervous system": "Among the cases successfully treated at this institution are disorders of the nervous system. The functional derangements such as nervous prostration, neurasthenia, and nerve exhaustion, have been treated with the best of results. All the life at the Sanitarium is adapted to the building up and reconstruction of the nervous system;" and, in another place in the catalogue, reference was made to the use of apparatus recognized as helpful, among other ends, to "resting tired nerves." *Held*, that the treatment thus described is "treatment of mental or nervous diseases" within the meaning of St. 1909, c. 490, § 5, cl. 3, as amended by St. 1914, c. 518, § 1.

CONTRACT for \$2,829.25, the amount of taxes alleged to have been illegally assessed upon property of the plaintiff and paid by it under protest. Writ dated November 10, 1915.

The action was heard upon an agreed statement of facts by *Morton, J.*, who, at the request of the parties and under St. 1917, c. 345, reported it without any decision to this court for determination.

R. L. c. 12, § 5, cl. 3, (St. 1909, c. 490, Part I, § 5, cl. 3,) as amended by St. 1914, c. 518, § 1, is as follows: "The personal property of literary, benevolent, charitable and scientific institutions and of temperance societies incorporated within this Commonwealth, the real estate owned and occupied by them or their officers for the purposes for which they are incorporated, and real estate purchased by them with the purpose of removal thereto, until such removal, but not for more than two years after such purchase. Such real or personal property shall not be exempt if

any of the income or profits of the business of such corporation is divided among the stockholders or members, or is used or appropriated for other than literary, educational, beneyolent, charitable, scientific or religious purposes, nor shall it be exempt for any year in which such corporation wilfully omits to bring in to the assessors the list and statement required by section forty-one; nor shall the personal property or real estate owned by such institutions or corporations and occupied by them or any department thereof wholly or partly as and for an insane asylum, insane hospital, institution for the insane or for the treatment of mental or nervous diseases, be exempt from taxation unless at least one fourth of all property so occupied wholly or partly, on the basis of valuation thereof, and one fourth of the income of all trust and other funds and property held for the benefit of such asylum, hospital or institution and not actually occupied by it for such purposes, be used and expended entirely for the treatment, board, lodging or other direct benefit of indigent insane persons, or indigent persons in need of treatment for mental diseases, as resident patients, without any charge therefor to such persons either directly or indirectly."

R. E. Buffum, for the plaintiff.

H. H. Richardson, for the defendant.

RUGG, C. J. This is an action of contract to recover taxes alleged to have been illegally assessed upon the property of the plaintiff and to have been paid under protest. The taxes were assessed pursuant to St. 1914, c. 518. The constitutionality of that act has been upheld and its meaning to some extent has been decided in *Massachusetts General Hospital v. Belmont*, *post*, 190, argued after this case and just decided. That decision governs the case at bar in those particulars:

The plaintiff is a charitable corporation. *New England Sanitarium v. Stoneham*, 205 Mass. 335. It is not contended that the plaintiff treats or cares for insane persons or uses any part of its property for an insane hospital or asylum. Persons suffering from mental derangement are not admitted to it. The only point now to be considered is whether its real estate is occupied "wholly or partly . . . for the treatment of mental or nervous diseases" within the meaning of the statute. The context does not confine these words to the treatment of such persons as ordinarily are

found in insane asylums. The natural import of the words is to include those not rightly describable within the classification of inmates of insane hospitals and kindred institutions. Persons suffering from mental or nervous disorders or weakness falling short of insanity, and not necessarily finding their appropriate treatment in institutions where the insane are confined, are aptly described by the words of the statute. It is matter of common knowledge that there are many persons who suffer from nervous prostration and mental exhaustion. It seems manifest that the phrase of the statute interpreted according to its ordinary sense comprehends such people.

The case comes before us by report on a statement of agreed facts. The only facts bearing upon this precise point are certain statements contained in the plaintiff's catalogue or pamphlet, which confessedly describe correctly its institution and methods. It there is said, under the caption, "Diseases of the nervous system": "Among the cases successfully treated at this institution are disorders of the nervous system. The functional derangements such as nervous prostration, neurasthenia, and nerve exhaustion, have been treated with the best of results. All the life at the Sanitarium is adapted to the building up and reconstruction of the nervous system."

In another place reference is made to the use of apparatus recognized as helpful, among other ends, to "resting tired nerves."

Treatment of such persons by the plaintiff brings it within the descriptive words of the statute.

Judgment for the defendant.

ANDREW G. STILES vs. MUNICIPAL COUNCIL OF THE CITY
OF LOWELL.

SAME vs. SAME.

Middlesex. January 13, 14, 1919. — June 19, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Municipal Corporations, Officers and agents. Civil Service. Actionable Tort. Lowell. Negligence, Of municipal officers. Damages, In tort. Evidence, Competency.

The members of the municipal council of the city of Lowell, in removing an officer whom the charter of the city empowers them to remove under the laws regulating the civil service, perform an executive or administrative act which in this particular must be performed in a judicial manner.

The cloak of office does not protect executive or administrative officers who interfere with rights of individuals in ways not authorized by law, but they are liable personally for such wrongful interference.

A majority of the municipal council of Lowell, in removing from office the city treasurer and tax collector, failed to notify him of their proposed action and to furnish him with a copy of the reasons which they contended constituted just cause for removal. *Held*, that the members who constituted such majority acted without authority in law and without jurisdiction and were liable personally for damage caused to such officer by their wrongful acts.

St. 1911, c. 645, § 40, relating to the removal by the municipal council of Lowell of certain city officers, does not delegate judicial power to the council.

The city treasurer and tax collector of Lowell, after his removal as above described, successfully prosecuted mandamus proceedings for reinstatement and the final order of the court therein awarded him costs. Thereafter he brought an action of tort to enforce against the majority of the council their personal liability, in which it was *held*, that he was entitled to have considered as an element of his damages the amounts reasonably paid by him for counsel fees in procuring reinstatement to office.

At the trial of the action of tort above described, it appeared that, after the reinstatement of the plaintiff in office following the mandamus proceedings, the municipal council by vote required of him a bond with a surety company as a surety, conditioned upon the faithful performance of his office, and that the plaintiff was unable to secure such a bond owing to the incidents attendant upon the litigation, so that he was compelled to resign his office. His salary was paid in full to the time of his resignation. He was unable to obtain more lucrative employment elsewhere. *Held*, that the plaintiff was entitled to have the jury consider as an element of his damages the loss he sustained by reason of his being thus compelled to resign and being unable to obtain more lucrative employment elsewhere.

At the trial of the action above described, testimony of agents of various bonding

companies, tending to show that the refusal of the companies to furnish a bond to the plaintiff was due to the incidents connected with the litigation attendant upon the plaintiff's removal and reinstatement, was competent.

At the trial of the action above described, the plaintiff was entitled to have the jury consider as an element of his damage such mental suffering on his part as was a natural and proximate result of the wrongful acts of the defendants.

Good faith and absence of malice in the perpetration of the wrong to the plaintiff were held to constitute no defence in the action above described.

At the trial above described, it appeared that the defendants had contended that they were justified in removing the plaintiff from office because he had left large sums of the city's money on deposit with a certain bank in preference to other banks and had failed to collect sums due to the city from that bank as interest on daily balances. It also appeared that actions at law had been brought against the plaintiff and the sureties on his official bond, after his removal from the office to which he later was reinstated, for failure to collect such interest. Subject to exceptions by the defendants, the plaintiff was allowed to testify that he had had a conversation with one of the defendants in which that defendant had stated that he would "get even" with the president of the bank in question because its president had refused to honor his note, and also to testify that he had been informed from various sources that there was no ground for the action against him and the sureties on his bond. *Held*, that the testimony as to the conversation with one of the defendants was admissible as tending to show malice toward the plaintiff, (which then was an issue, although it later was withdrawn as an issue by the plaintiff,) and that both that conversation and the other testimony of the plaintiff were admissible as tending to refute the defendants' contention that the plaintiff's mental suffering was caused, not by their wrongful action in removing him, but by the controversy as to the relations between the plaintiff and the bank in question.

TWO ACTIONS OF TORT against three of the five members of the municipal council of the city of Lowell for damages suffered by the plaintiff when he was wrongfully removed from the office of city treasurer and collector of taxes, the first time being on January 8, and the second being on February 20 and March 6, 1917. Writs dated June 23, 1917, and January 5, 1918.

In the Superior Court the actions were tried together before *J. F. Brown, J.* It appeared that on the occasion of the vote of the municipal council of the city of Lowell, which removed the plaintiff on January 8, 1917, the three defendants, who constituted a majority of the council, alone voted in the affirmative. On the occasion of the votes of February 20 and March 6, 1917, the vote of the council was unanimous. By decisions of this court on two petitions for writs of mandamus, reported in *Thomas v. Municipal Council of Lowell*, 227 Mass. 116, and *Stiles v. Municipal Council of Lowell*, 229 Mass. 208, it was determined

that the removals of the plaintiff from office were wrongful. The final orders of the court, after rescripts from this court, in each of those cases awarded costs to the petitioner, the plaintiff in these actions.

After the plaintiff's reinstatement in accordance with the writ which issued upon the second petition, the municipal council ordered that the plaintiff be required to give a surety company bond in the sum of \$50,000. Evidence was admitted, subject to exceptions by the defendant, to the effect that the plaintiff was unable to procure such a surety company bond because the companies did not wish to undertake the risk by reason of the legal history of the case and the political discord existing between the plaintiff and the municipal council of Lowell.

One of the contentions of the defendants in support of their action in removing the plaintiff was that the plaintiff improperly left large sums of money on deposit with the Lowell Trust Company in preference to other banks and that he had failed to collect interest due the city from that bank on daily balances.

The defendants offered to prove that all the proceedings and actions in reference to both removals of the plaintiff were on the advice of the city solicitor, both as to the mode of procedure and the form of notice and all things they did in reference to the votes of removal. This evidence was excluded subject to exceptions by the defendants.

The defendants then offered to prove that in all that they did in reference to the two removals and all things pertaining to it, they acted in good faith and on advice of the city solicitor, and that they were acting in a judicial capacity; and they excepted to a ruling of the judge excluding the above testimony. Thereupon counsel for the plaintiff stated that for the purposes of this trial the plaintiff did not contend that the defendants were actuated by any actual malice, or that there was any lack of good faith on their part.

Other material facts and evidence and the exceptions of the defendants are described in the opinion.

At the close of all the evidence, the judge denied motions of the defendants that verdicts be ordered for them. The defendants asked for the following rulings, applicable to both cases, which were refused:

"1. If the jury find that these defendants honestly and in good faith attempted to remove the plaintiff from his office, then their verdict should be for the defendants.

"2. In order to recover the plaintiff must prove by a fair preponderance of the evidence that in attempting to remove the plaintiff from office, these defendants were actuated by malice in fact.

"3. If the jury find that in attempting to remove the plaintiff from office these defendants were acting in a judicial capacity over a subject matter concerning which they had jurisdiction and that they did not exceed their jurisdiction, then these defendants are not liable although the jury find that they erred or made a mistake of judgment while acting in the above manner.

"4. That inasmuch as the defendants had the right to vote to remove the plaintiff from office, but made an honest mistake in reference to the procedure required by law, and failed to adopt and follow said procedure, then their mere failure in this respect would not make them liable in this action.

"5. If the defendants at the time they voted to remove the plaintiff from office were members of a legislative body and all that they did in attempting to remove the plaintiff was done by them as members of the said legislative body, and that the said legislative body had the jurisdiction of the removal of the plaintiff, then these defendants are not liable if they acted in good faith, although they might have erred or made a mistake in the matter of procedure.

"6. As a matter of law an act done by the defendants honestly and fairly as members of the municipal council of the city of Lowell over a subject matter entrusted to said council, would not incur any personal liability to these defendants.

"7. As a matter of law there is a presumption that the defendants were acting with a desire to conform to the law and every reasonable inference is to be drawn in support of the validity of said acts on the part of these defendants.

"8. Under the law and the charter the plaintiff was bound to file a bond, and if he was unable to do so, then he became ineligible to hold said office and no longer held any claim thereto.

"9. As a matter of law upon all the evidence these defendants cannot be held liable for any failure of the plaintiff to file a bond.

"10. As a matter of law the unsuccessful attempt made by the

municipal council to oust the plaintiff was not in law the proximate cause of the plaintiff's failure to file a bond.

"11. If the jury find that the charges filed against the plaintiff were sufficient in the opinion of the municipal council for his dismissal and said charges were proved, then the plaintiff cannot complain for relinquishing his office.

"12. As a matter of law, these defendants upon the evidence are not liable for counsel fees incurred by the plaintiff in attempting to reinstate himself in office.

"13. As a matter of law these defendants are not liable for any pain or suffering, if any, endured by the plaintiff on account of being removed by the municipal council, although these defendants voted for said removal.

"14. As a matter of law upon the evidence the plaintiff is not entitled to recover for any injury to his reputation.

"15. If the jury find that up to the time the plaintiff resigned his office he received all the salary then due him, then he is not entitled to recover in this action.

"16. If the jury find that the plaintiff was damaged, then upon the evidence and the law the plaintiff in this action is only entitled to nominal damages.

"17. If the jury find that the plaintiff resigned from his office, then he is not entitled to recover in this case.

"18. As a matter of law the plaintiff is bound by his election in bringing the mandamus proceedings and is not entitled to maintain this action.

"19. As a matter of law there is no evidence in this case that these defendants exceeded their jurisdiction in attempting to remove the plaintiff from his office.

"20. As a matter of law the plaintiff as a public officer accepted his office with the incidental power upon the part of the municipal council to remove him for just cause.

"21. That if the defendants acted in good faith in all that they did in relation to the attempted removals of the plaintiff, then they are not liable.

"22. In order to recover the plaintiff must prove by a fair preponderance of the evidence, that in voting to remove the plaintiff from office, the defendants were actuated by malice or lack of good faith.

"23. The defendants are not liable to the plaintiff because of the fact that the plaintiff failed, or was unable, to procure a bond with sureties.

"24. The plaintiff was removed from the office of city treasurer and collector of taxes by vote of the municipal council and the defendants are not liable individually for any of the act or acts of said municipal council in so voting.

"25. The plaintiff was removed from the office of city treasurer and collector of taxes by vote of the municipal council; that all members of said municipal council were present and voted; that because the defendants as members of said body, voted to remove the plaintiff from said office, does not make them liable for any damages which he suffered as a consequence of the vote of said council."

The defendants also asked for the following rulings applicable only to the second case, which were refused:

"26. That upon all the evidence the plaintiff is not entitled to recover in this action because the vote of the municipal council of February 20, 1917, removing the plaintiff from the office of city treasurer and collector of taxes, was the vote of the entire members thereof, and the defendants are not liable for any damages resulting from the vote of all the members of the municipal council.

"27. That the vote of removal was passed by the Municipal Council on February 20, 1917, and not March 6, 1917, as alleged in the plaintiff's declaration, and therefore the plaintiff is not entitled to recover."

The judge instructed the jury in each case to return a verdict for the plaintiff at least in nominal damages, and for such additional sums as they found the plaintiff had suffered by reason of the two illegal acts on the defendants' part.

The jury found for the plaintiff in the first action in the sum of \$1,000, and in the second action in the sum of \$1,800; and the defendants alleged exceptions.

St. 1911, c. 645, § 40, being a part of the charter of the city of Lowell, is as follows: "The municipal council shall have the power under the laws regulating the civil service to suspend or remove any executive or administrative officer or head of a sub-department it has the power to appoint, for such cause as it shall deem sufficient. The municipal council shall set forth in the

order of suspension or removal its reasons therefor: provided, that nothing contained in this section shall apply to any of the following special departments, namely, school committee, license commission, or the trustees of the public library."

St. 1904, c. 314, § 2, as amended by St. 1905, c. 243, is as follows: "The person sought to be removed, suspended, lowered or transferred shall be notified of the proposed action and shall be furnished with a copy of the reasons required to be given by section one, and shall, if he so requests in writing, be given a public hearing, and be allowed to answer the charges preferred against him either personally or by counsel. A copy of such reasons, notice and answer and of the order of removal, suspension or transfer shall be made a matter of public record: provided, however, that nothing contained in this act shall be construed to prevent temporary suspension for a period not exceeding thirty days, made without compliance with the provisions of this act and pending further action under this act."

J. C. Reilly (*J. J. Kerwin* with him,) for the defendant Morse.

J. J. Ronan, (*W. D. Regan* with him,) for the defendants Warnock and Brown.

S. E. Qua, (*A. S. Howard* with him,) for the plaintiff.

RUGG, C. J. These are two actions of tort brought to recover damages for two attempted removals of the plaintiff, the first in January, 1917, and the second in February and March, 1917, from the office of city treasurer and collector of taxes of the city of Lowell. The defendants on those dates were three of the five members constituting the municipal council of Lowell. The municipal council of Lowell was clothed with authority to remove the city treasurer from office for such cause as it deemed sufficient, provided it proceeded in accordance with the law regulating the civil service. St. 1911, c. 645, § 40. It had no power in that regard except by following the terms of that law. The provisions of the civil service law required as essential preliminaries that reasons be specifically given in writing and that the person sought to be removed should be notified of the proposed action and furnished with a copy of reasons claimed to constitute just cause for removal. The defendants, being a majority of the municipal council, joined in going through the form of adopting orders removing the plaintiff from the office of

city treasurer without notifying him of the proposed action and without giving him any copy of reasons for removal. Therefore it has been held expressly that the orders "were a nullity and were wholly ineffectual" as attempts to remove the plaintiff from office. *Thomas v. Municipal Council of Lowell*, 227 Mass. 116, 119. *Stiles v. Municipal Council of Lowell*, 229 Mass. 208, 210. The duty of the defendants to give the notice and hearing to the plaintiff was certain and specific. The statute covered the ground completely and left nothing to the exercise of discretion. *Ransom v. Mayor of Boston*, 193 Mass. 537, 540.

The defendants, in passing upon the question of the removal of a city officer under civil service rules, were executive or administrative officers. If they had followed the requirements of the civil service laws in making the removal, they then would have been performing functions to some extent judicial. The power to remove an officer in the public service is in its nature executive, when considered by itself alone. *Murphy v. Webster*, 131 Mass. 482. When, as essential prerequisites to the exercise of that power, there must be a formulation of specific charges as grounds for removal, notice of those charges to the person to be removed, opportunity to him for a hearing, followed by a hearing and decision, then the hearing and decision partake also of the "nature of a judicial investigation." *McCarthy v. Emerson*, 202 Mass. 352, 354. *Driscoll v. Mayor of Somerville*, 213 Mass. 493, 494. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 548. *State v. Common Council of Superior*, 90 Wis. 612, 619. The functions of the members of the municipal council are like those of selectmen in deciding upon the qualifications of voters, which, as was said by Chief Justice Shaw, are "in this respect, to some extent judicial." *Blanchard v. Stearns*, 5 Met. 298, 300. Speaking with accuracy, the removal by a municipal council under these circumstances is still an executive or administrative act which must be performed in this particular in a judicial manner. See *Levangie's Case*, 228 Mass. 213.

Treating the liability of the defendants in its executive or administrative aspect, they are bound to act in accordance with the law. They acquire no authority in the premises except such as the law confers. The plaintiff had an interest in remaining in office, of which he could not be deprived except in accordance with law.

Continuance in office was valuable to him both as a means of support and as matter of reputation. *Ham v. Boston Board of Police*, 142 Mass. 90, 95. *Hill v. Mayor of Boston*, 193 Mass. 569, 575. The incumbent of an office carrying emolument has rights protected from assault by third persons, although as against the State itself his relation may be of a different nature. *Ashley v. Three Justices of the Superior Court*, 228 Mass. 63, 73. Personal liability attaches to executive or administrative officers who interfere with rights of individuals in ways not authorized by law. The cloak of office is no protection to them even when acting in good faith. The principle by which personal liability is fixed on field drivers for taking stray cattle except as provided by the statute, *Coffin v. Field*, 7 Cush. 355, on members of the board of health for killing a well horse honestly but mistakenly supposed to have glanders, *Miller v. Horton*, 152 Mass. 540, on selectmen and other officers when acting as members of an election or registration board in refusing to put on the voting list and to permit to vote a man entitled to vote, *Larned v. Wheeler*, 140 Mass. 390, on assessors for making an illegal assessment, *Stetson v. Kempton*, 13 Mass. 272, 283, and in general on municipal officers for acts of personal misfeasance in performance of public duty, *Moynihan v. Todd*, 188 Mass. 301, is controlling when the position of the defendants is considered as executive or administrative.

If the defendants' position is approached from the viewpoint of exercising the judicial faculty, the same result follows. "All inferior tribunals and magistrates . . . if they act without any jurisdiction over the subject matter; or if . . . they are guilty of an excess of jurisdiction . . . are liable in damages to the party injured by such unauthorized acts." *Piper v. Pearson*, 2 Gray, 120, 122. *Clarke v. May*, 2 Gray, 410. *Doggett v. Cook*, 11 Cush. 262. *Sullivan v. Jones*, 2 Gray, 570. *Kelly v. Bemis*, 4 Gray, 83. *Kendall v. Powers*, 4 Met. 553. *Brewer v. Casey*, 196 Mass. 384, 387. *Von Arx v. Shafer*, 154 C. C. A. 407; S. C. 241 Fed. Rep. 649, 650. Although there are contrary decisions on this point, to the effect that good faith may be a defence or that there is liability only if there is malice, the weight of authority is in favor of the absolute liability established so firmly in our jurisprudence by the decisions already cited as not to be open further to discussion. The case at bar is indistinguishable in essence from the established

liability of election officers for a well intentioned mistake of judgment in refusing registration and in denying the right to vote to one duly qualified. *Lincoln v. Hapgood*, 11 Mass. 350. *Blanchard v. Stearns*, 5 Met. 298, 300. *Kinneen v. Wells*, 144 Mass. 497, 504.

It is plain that the defendants never acquired a jurisdiction to exercise their *quasi* judicial functions respecting the removal from office of the plaintiff, because they never notified him and never gave him a copy of the charges against him and he did not voluntarily submit himself to their action, but has resisted and asserted the invalidity of their procedure at every point. The full performance of all conditions established by the statute are essential prerequisites to the jurisdiction of the municipal council over the subject matter of the removal of an officer. There is no delegation of judicial power to the municipal council. *Holcombe v. Creamer*, 231 Mass. 99, and cases collected at page 111. That hardly could be done under our Constitution, which sharply separates the three departments of government. *Boston v. Chelsea*, 212 Mass. 127.

The municipal council was clothed with the power of removal of city officers so long as there was conformity to the requirements of the law. When the members ceased to comply with the law they were acting outside their official capacity and were subjected to responsibility as individuals.

It follows that the trial judge rightly ordered verdicts for the plaintiff for at least nominal damages. *Ransom v. Boston*, 196 Mass. 248.

The plaintiff was entitled to have considered as an element of his damages the amounts reasonably paid for counsel fees in procuring reinstatement in office. He was obliged to resort to the court for redress and to employ counsel to that end. Those proceedings were rendered imperative, in order that he might protect his rights, by the tortious conduct of the defendants. The plaintiff was not obliged to incur these expenses through any misfeasance or contract of his own, but wholly by reason of the wrongdoing of the defendants, of which these expenses were the immediate and direct result. As was said in *Wheeler v. Hanson*, 161 Mass. 370, 376: "It has been held more than once in this State, that when the plaintiff has, in consequence of the wrongful conduct of the defendant, been put to expense in the employment

of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct." *Berry v. Ingalls*, 199 Mass. 77. *Maguire v. Pan-American Amusement Co.* 205 Mass. 64, and cases collected at page 68. *Sears v. Nahant*, 215 Mass. 234, 239, 240. The case at bar is within this principle. It is quite different from those decisions where the taxable costs are held, so far as concerns a particular proceeding, to be full compensation for expenses in conducting litigation, such as *Newton Rubber Works v. De las Casas*, 182 Mass. 436, and cases cited at page 438, and *McIntire v. Mower*, 204 Mass. 233, 237. See *Fitzgerald v. Heady*, 225 Mass. 75.

There was no error in permitting the jury to consider the damages caused to the plaintiff by being obliged to resign his office. It might have been found that the plaintiff's inability to secure the required surety on his bond was due directly to the illegal conduct of the defendants and flowed from it as a natural consequence. See *Ransom v. Boston*, 192 Mass. 299, 307. It is not an answer in this connection that the plaintiff was restored to his office by mandamus proceedings and was ultimately paid his salary up to the time of his resignation. With respect to the conduct of the defendants here in issue, the plaintiff had a legal right to remain in office unmolested. If the unlawful efforts of the defendants to remove him from office so injured his standing and reputation in the community and with bonding companies that he could no longer secure surety on his bond and thereby was compelled to resign, that would constitute an element of damage provided he was unable to get more lucrative employment elsewhere.

Testimony as to the reasons given by agents of the bonding companies for refusal to become surety on the plaintiff's bond was competent. *Weston v. Barnicoat*, 175 Mass. 454. *Hubbard v. Allyn*, 200 Mass. 166, 174.

The plaintiff was entitled to have the jury consider in assessing his damages the mental suffering which he sustained so far as it was the natural and proximate result of the unlawful conduct of the defendants. It might have been found that a feeling of humiliation and a sense of degradation would ensue to the ordinary person as the normal and direct consequence of the illegal expulsion from office. Mental suffering ordinarily has been held not

to be an independent cause of action. The reason for this in large part, as was said by Lurton, J., in a dissenting opinion in *Wadsworth v. Western Union Telegraph Co.* 86 Tenn. 695, "is found in the remoteness of such damages and in the metaphysical character of such an injury. . . . Such injuries are generally more sentimental than substantial." *Summerfield v. Western Union Telegraph Co.* 87 Wis. 1. The rule is well settled, however, that if the natural consequence of the wrongful act, done wilfully or with gross negligence, is mental suffering to the plaintiff, then that element may be considered in assessing damages. *Meagher v. Driscoll*, 99 Mass. 281. *Fillebrown v. Hoar*, 124 Mass. 580, 585. In the application of this rule it has been held that one, acting on the erroneous but honest belief that the plaintiff was an apprentice in his employ, who made a false statement to that effect, the expected result being the discharge of the plaintiff, was liable in damages including mental suffering. *Lombard v. Lennox*, 155 Mass. 70. It also has been held that the jury, in assessing the damages to a boy "unlawfully excluded" from a public school, might consider the indignity or disgrace which followed the expulsion. In that case as reported there is shown no malice or want of good faith, and nothing more than honest mistake of their legal duty as to giving hearing on the part of the school committee. *Morrison v. Lawrence*, 181 Mass. 127. The case at bar falls within the principle applied in these two decisions and is indistinguishable from them in any essential particular. Good faith and absence of malice in the perpetration of such a palpable wrong to the plaintiff constitute no defence to the defendants against the almost inevitable effect of their acts. In *Bishop v. Rowley*, 165 Mass. 460, liability was established although apparently the school committee acted in entire good faith in refusing to grant a hearing to the scholar excluded from school. See *Austro-American Steamship Co. v. Thomas*, 160 C. C. A. 309; *S. C.* 248 Fed. Rep. 231. The case at bar is distinguishable from *White v. Dresser*, 135 Mass. 150, *Burton v. Scherpf*, 1 Allen, 133, *Lopes v. Connolly*, 210 Mass. 487, *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, 289, and kindred decisions.

Evidence of the plaintiff narrating a conversation with the defendant Brown, wherein the latter stated in effect that he would "get even" with the Lowell Trust Company because its

president had refused to honor his note, was admissible as tending to show malice toward the plaintiff on the part of Brown, then an issue although subsequently waived, and also as tending to eliminate that charge as a cause of worry to the plaintiff. On cross-examination of the plaintiff it had been developed, that in the spring of 1917 after the illegal removals, action had been brought against him and the sureties on his bond by the city of Lowell, for failure to collect interest on deposits of city money from the Lowell Trust Company. It was pertinent, in reply to the natural effect of this evidence, for the plaintiff to testify that he had been informed from various sources that there was no ground for that action, in order to rebut the inference that his mental distress came from that cause.

It is not necessary to go through the exceptions to evidence in further detail. A careful examination of them satisfies us that there was no reversible error in these particulars.

The defendants' requests for rulings need not be reviewed one by one. It follows from what has been said that there was no error in the refusal of these requests, and that the instructions given are not open to just criticism in law.

Exceptions overruled.

THOMAS P. MURRAY vs. JUSTICES OF THE MUNICIPAL COURT OF
THE CITY OF BOSTON.

Suffolk. January 20, 1919. — June 19, 1919.

Present: RUGG, C. J., LORING, BRALEY, & CARROLL, JJ.

Civil Service, Review of removal. Words, "Review," "Without proper cause."

The "review," provided for by St. 1918, c. 247, § 3, upon a petition filed in a police, district or municipal court, of the action of an officer or board resulting in the removal from office, transfer, lowering in rank or compensation or suspension of certain persons classified under the civil service, is not a complete new trial of the case upon its merits, where the whole matter is reopened and tried again regardless of the initial decision.

The provision of the statute above described is for a re-examination of the action sought to be reviewed for the purpose of revising it if it appears not to have been based upon the exercise of an unbiased and reasonable judgment, and does

not import a reversal of such action if it is found to have been honestly made upon evidence which appears to an unprejudiced mind sufficient to warrant the decision made although the evidence was of such a character respecting its weight that two impartial minds well might record different conclusions and the reviewing magistrate, if trying the whole issue afresh, might make a different finding from that being reviewed.

Under the provisions of that statute, that the reviewing court "shall affirm said order unless it shall appear that it was made without proper cause or in bad faith," if the reviewing judge finds that he would "not have arrived, on a careful consideration of the entire evidence presented at the public hearing, at the conclusion reached" by a board whose action was being reviewed, but would "on this evidence have found that these charges were not sustained," but that, if the board believed the testimony of a certain witness, which was fairly and honestly given, such "evidence taken by itself was sufficient to justify a finding that" the charges were sustained, and that the board did believe such evidence, a further finding by the judge, that the decision of the board was not made in bad faith and that it did not appear that it was made without proper cause, is warranted and a dismissal of the petition is proper.

PETITION, filed on August 13, 1918, for a writ of certiorari quashing a judgment of the Municipal Court of the City of Boston, affirming, in proceedings brought by the petitioner under St. 1918, c. 247, § 3, the action of the board of trustees of the Boston State Hospital in removing the petitioner from the position of engineer.

The petition was heard by *Crosby, J.*, who ordered that the writ should issue as prayed for, and, at the request of the respondents, reported the case for determination by the full court.

M. L. Levenson, Assistant Attorney General, for the respondents.

F. W. Mansfield, for the petitioner.

RUGG, C. J. The petitioner was removed from his employment as assistant engineer at the Boston State Hospital after hearing had in conformity to the civil service law. Thereafter he filed a petition in the Municipal Court of the City of Boston under St. 1918, c. 247, § 3. It there is enacted that a person removed from such employment may file a petition praying that the action of the officer or board in making such removal may be reviewed by the court, and that after appropriate notice the court shall "review such action, hear the witnesses, and shall affirm said order unless it shall appear that it was made without proper cause or in bad faith, in which case said order shall be reversed and the petitioner be reinstated. . . ." The return shows that the judge who heard the petition among other matters

found that the order of removal was made in good faith. Other findings and rulings are in these words: "As to the specifications assigned under the head of 'Incompetence,' while I should not have arrived on a careful consideration of the entire evidence presented at the public hearing, at the conclusion reached by the trustees, but should on this evidence have found that these charges were not sustained, yet, I find, if the trustees believed the testimony of the chief engineer, and the evidence offered in corroboration thereof, in preference to that offered by the petitioner in refutation thereof, that evidence taken by itself was sufficient to justify a finding that said charges of incompetence had been sustained. I find that the testimony of the chief engineer was fairly and honestly given, that in giving it he was actuated by no improper or unworthy motive, that he honestly believed the charges which he had preferred against the petitioner to be true, that in giving his evidence he showed no bias or hostility toward the petitioner, and that his testimony was believed by the board of trustees and in the main formed the basis of the decision at which in good faith they arrived, that the petitioner should be discharged. I rule that under the law the burden is on the petitioner to establish affirmatively by a fair preponderance of evidence that in removing him the trustees acted either in bad faith or without proper cause, and that this burden has not been sustained." The order of removal was affirmed. This petition for a writ of certiorari to quash the record of the Municipal Court of the City of Boston for errors of law was thereupon brought.

The case turns upon the interpretation of the crucial part of the statute, which has already been quoted. The correct meaning must be gathered from the words used and the end apparently aimed at by the General Court in passing the statute. The requirement, that the court shall "review" the action of the officer or board making the removal, must be construed in connection with the further mandate that, after hearing the witnesses, he "shall affirm said order unless it shall appear that it was made without proper cause or in bad faith." Treating these provisions in relation to each other, they are not equivalent to common provisions of law respecting hearings on appeal, where the whole matter is reopened and tried again regardless of the initial decision. The

order of removal is to be reversed only when "made without proper cause or in bad faith." That provision differs manifestly from one providing for a complete new trial or a full hearing of the matter upon its merits. Removal without proper cause includes a removal for reasons which are insufficient, frivolous or irrelevant, and a removal grounded upon evidence which to fair minded persons appears inadequate to justify the conclusion reached but falling short of an exercise of bad faith. This may not be an exhaustive definition, but it is sufficient for the present case. The word "review" does not in this connection imply a retrial upon the merits. It indicates a re-examination of a proceeding, already concluded, for the purpose of preventing a result which appears not to be based upon the exercise of an unbiased and reasonable judgment. It does not import a reversal of the earlier decision honestly made upon evidence which appears to an unprejudiced mind sufficient to warrant the decision made although of a character respecting the weight of which two impartial minds might well reach different conclusions, and upon which the reviewing magistrate, if trying the whole issue afresh, might make a different finding. It was entirely consistent for the judge of the Municipal Court to feel that he would decide the case differently on its merits, if it had been within his jurisdiction to do so, and yet to find that the decision of the superintendent and board of trustees of the hospital did not appear to have been "made without proper cause." *Swan v. Justices of the Superior Court*, 222 Mass. 542.

He ruled correctly that the burden of proof of establishing the essential statutory facts rested upon the petitioner. That also is involved in the words of the statute.

Cases relating to the course of procedure upon writs of review are not controlling in this connection, because it there is expressly provided that the case shall be tried anew.

It follows that as matter of law the entry must be

Petition dismissed.

MASSACHUSETTS GENERAL HOSPITAL vs. INHABITANTS
OF BELMONT.

SAME vs. SAME.

Middlesex. January 20, 1919. — June 19, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Tax, Exemption. Corporation, Charitable. Charity. Statute, Construction. Constitutional Law, Equal protection of the law, Due process of law. Massachusetts General Hospital. McLean Hospital. Evidence, Of value, Admissions, Returns to State officers. Words, "Therefor," "Indigent persons," "Fair cash value."

In St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, providing that there should not be included among the charitable institutions exempted from taxation corporations whose property is used for an insane asylum, insane hospital or for the treatment of mental or nervous diseases unless at least one fourth of all property so occupied on the basis of valuation thereof, and one fourth of the income of all trust and other funds and property held for the benefit of such institution and not actually occupied by it for such purposes "be used and expended entirely for the treatment, board, lodging or other direct benefit of indigent insane persons, or indigent persons in need of treatment for mental diseases, as resident patients, without any charge therefor to such persons either directly or indirectly," the word "therefor" refers to the words "treatment, board, lodging or other direct benefit."

The word, "therefor," according to the approved usages of language, ordinarily refers to the last and not to a more remote antecedent noun or phrase.

It here *was said* that in a broad sense the words "indigent persons," as used in the amendment above described, include those insane persons and persons in need of treatment for mental diseases who by reason of poverty are unable, having due regard to other imperative obligations resting upon them, to contribute any substantial amount to their support at the institution.

The provision of the amendment above described, that, in order that the institutions referred to therein should be exempted from taxation, one fourth of the property occupied wholly or partly for the designated use, on the basis of valuation, and one fourth of the income from property held for its benefit must be devoted without charge to the direct benefit of indigent insane persons or of indigent persons in need of treatment for mental diseases, does not require of necessity a physical line of demarcation between the portion of real estate devoted to paying patients and those given over to the use of free patients, nor does it refer to a fractional use of the property based on numbers of patients; but it signifies that, in order that such an institution should enjoy exemption from taxation, on a fair basis of computation, having reference both to numbers of patients treated so far as concerns enjoyment of property adapted for and applied to a use in common by paying and free patients and to definite property so far as there is a

strict separation between paying and free patients, one fourth of its property in value must be used for the benefit of the latter, and, computing by the same method so far as practicable, one fourth of the income described must be used likewise.

The statute above described as amended is not an unworkable piece of legislation. General law declaratory of a scheme of public policy as to exemption from taxation may be changed by the General Court provided no constitutional guaranty is violated.

In the absence of some binding contract, no one has a legal right to the continuance of existing laws as to taxation.

The statute above described as amended does not deny to the Massachusetts General Hospital, owning property in the town of Belmont which is called the McLean Hospital and which is taxable under the provisions of the statute, the equal protection of the laws guaranteed both by the State and the federal Constitutions.

The classification in the statute above described as amended, which selects from the literary, benevolent, charitable and scientific institutions and temperance societies that before the amendment were entitled to be exempt from taxation certain insane asylums, insane hospitals, institutions "for the insane or for the treatment of mental or nervous diseases" which devote only a portion of their property and income to "indigent persons" who are patients, as described, and deprives them of the exemptions, on its face is not irrational.

The mere fact that only two institutions in the Commonwealth are included within the classifications above described, although it is a factor not to be lightly disregarded, is not conclusive against the validity of the statute, where it appears that the classification is rational.

The classification above described does not effect a clearly hostile discrimination against a particular corporation or person or class outside the limits of general usage, but is within a custom respecting classification touching the general subject which long has obtained in this Commonwealth.

The enforcement of the statute above described as amended, by the collection by the town of Belmont of a tax upon property of the Massachusetts General Hospital in Belmont known as the McLean Hospital, does not deprive the corporation of its property without due process of law.

Nor does the removal of the exemption from taxation, effected by the amendment above described, deprive such corporation of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights.

The tax as assessed upon the corporation as above described is not a violation of the requirement of c. 1, § 1, art. 4, of the Constitution of the Commonwealth that taxes be "proportional and reasonable."

The "fair cash value" of land for the purposes of taxation is ascertained by a consideration of all those elements which make it attractive for valuable use to one under no compulsion to purchase but yet willing to buy for a fair price, attributing to each element of value the amount which it adds to the price likely to be offered by such a buyer.

At a hearing of a petition under St. 1909, c. 490, Part I, § 77, appealing from a refusal of the assessors of the town of Belmont to abate a tax assessed under the provisions of the amendment contained in St. 1914, c. 518, § 1, above described, upon the land and buildings which for many years had been used for the McLean Hospital, the petitioner requested many rulings which correctly stated various principles which must be observed in ascertaining the fair cash value of the

property for the purposes of taxation, and the judge granted the requests with the qualification that the phrase "fair cash value," as applied to the petition under consideration, could not be expressed in a single sentence. The petitioner excepted. *Held*, that no error was shown.

At the same hearing the petitioner asked for and the judge refused a ruling that "The 'fair cash value' of the real estate in question consists of the value of the property in the market apart from its special adaptability for hospital purposes, plus such sum as a purchaser might add to that value because of the chance that the property might at some time be sought for use as a hospital." *Held*, that the refusal of the ruling could not be pronounced erroneous, the ruling being inapplicable to property already devoted to the uses of an insane asylum, which therefore might be thought its primary and most valuable use. *Sargent v. Merrimac*, 196 Mass. 171, 174, distinguished.

For the reason above stated, it likewise was *held* not to have been erroneous for the judge to have refused to rule, "The 'fair cash value' of the real estate in question is no greater than it would be if such real estate were owned by a person to whom the buildings and improvements were of no use."

And for the same reason it was *held* not to have been erroneous for the judge to refuse to rule "The 'fair cash value' of the real estate in question is the value which the petitioner could have obtained for it at the date as of which the assessment is made, if it had then desired to sell said real estate, after fair and reasonable efforts had been made to find a purchaser who would give the highest price for it."

The judge also, at the hearing above described, being asked to give as a ruling, "The 'fair cash value' of the real estate in question is the value which it would have had on April 1 [of the year in question] in the hands of any owner," gave the ruling with a modification which added the words, "including the present owner." *Held*, that the modification of the ruling was not erroneous.

At the hearing above described, the petitioner asked for a ruling, "The value of the real estate in question to the petitioner over and above its value to any other owner is not to be included in fixing the 'fair cash value,'" and also for a ruling, "The 'fair cash value' of the estate for the purposes of taxation cannot exceed the sum which the owner after reasonable effort could, at the date as of which the assessment is made, obtain for it in cash." The judge refused to make these rulings and filed a "memorandum" which tended to show that, although he accepted many correctly stated rulings of law in computing the "fair cash value" of the property in question, he still might have increased the full amount which could have been secured for the property in the market by substantial elements of its value to the petitioner alone. The petitioner excepted. *Held*, that the exception must be sustained and the case remanded to the Superior Court for further hearing.

Returns made by the petitioner under St. 1909, c. 490, Part I, § 41, showing a valuation upon its real estate, introduced in evidence at the hearing above described, were *held* not to have been inadmissible.

The petitioner in the petition above described was the Massachusetts General Hospital, having a usual place of business in Boston, but owning the property in question in Belmont. Its return to the assessors was sworn to before a notary public and not before one of the assessors of Belmont. *Held*, that the return was properly sworn to under St. 1909, c. 490, Part I, § 43, as it could not be said that the petitioner was not a person absent from Belmont.

TWO PETITIONS, filed on March 6, 1916, and February 5, 1917, in the Superior Court under St. 1909, c. 490, Part I, § 77, respectively appealing from refusals of the assessors of taxes of the town of Belmont to abate a tax of \$26,334.56 assessed in 1915 upon property of the petitioner in the town of Belmont, used by the petitioner to conduct the McLean Hospital, and a tax of \$25,916.68, assessed upon the property in 1916.

The petitions were referred to a commissioner, who filed a report to which were appended a transcript of all the testimony and all of the exhibits in evidence before him. He found that the valuation fixed by the assessors in 1915 "was not unreasonable or in excess of the fair cash value of the real estate." He found that the valuation fixed by the assessors in 1916 was \$43,370 in excess of the fair cash value of the real estate.

The petitions were heard by *Fox, J.*, upon the reports of the commissioner and the exhibits and transcripts of testimony appended to the report, it having been agreed that the testimony contained in the transcript should be received and considered as evidence at the trial in like manner as if the witnesses were present and so testified, and that such objections to the competency of any of the evidence, whether oral or documentary, as were duly taken at the hearings before the commissioner and set out in the transcript of testimony filed by him as aforesaid might be made at the trial in the same manner as if the evidence then were offered for the first time.

At the close of the evidence, the petitioner asked for the following rulings in each case:

"1. The burden of proof rests on the respondent to show that the real estate in question is subject to the tax now in question.

"2. Upon all the evidence the petitioner is entitled to recover the amount paid as a tax on its real estate in Belmont for the year 1915 [1916, in the second case] with interest thereon from the date when said amount was paid.

"3. The assessment of a tax upon the petitioner's real estate in Belmont for the year 1915 [1916, in the second case] was illegal and void.

"4. St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, does not authorize the imposition of the tax now in question.

"5. According to the true construction of St. 1909, c. 490, Part I,

§ 5, as amended by St. 1914, c. 518, § 1, the personal property and real estate owned by the petitioner and occupied by the department known as the 'McLean Hospital' is exempt from taxation if at least one-fourth of all the property so occupied wholly or partly, on the basis of valuation thereof, and one-fourth of the income of all trust and other funds and property held for the benefit of said McLean Hospital and not actually occupied by it, are used and expended for the treatment, board, lodging or other direct use of indigent insane persons, or indigent persons in need of treatment for mental diseases, as resident patients, without any charge to such persons either directly or indirectly for the use of the property so occupied or for benefits received through the expenditure of such income.

"6. The words 'without any charge therefor' in the last clause of St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, are to be construed as meaning 'without any charge for the use of the property occupied by the institution or department in question for the purposes specified or for benefits received through the expenditure of the income of all trust and other funds and property held for the benefit of such institution or department and not actually occupied by it for such purposes.'

"7. Inmates of the McLean Hospital to whom a charge is made for treatment received and accommodations enjoyed there, which charge is less than the expense of furnishing such treatment and accommodations, because they are unable to pay more, so that they are maintained in the hospital at a loss to the complainant are 'indigent' within the meaning of St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1.

"8. If St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, purports to warrant the imposition of the tax now in question, it is repugnant to the constitution of Massachusetts and to the Constitution of the United States.

"9. If St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, purports to warrant the imposition of the tax now in question, it deprives the complainant of its property, immunities and privileges in violation of art. 12 of the Declaration of Rights.

"10. If St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, purports to warrant the imposition of the tax now in question, it is repugnant to the requirement contained in art. 4

of § 1 of c. 1 of the Constitution of Massachusetts that assessments, rates and taxes shall be proportional and reasonable.

"11. If St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, purports to warrant the imposition of the tax now in question, it denies to the complainant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

"12. If St. 1909, c. 490, Part I, § 5, as amended by St. 1914, c. 518, § 1, purports to warrant the imposition of the tax now in question it deprives the complainant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

"13. The term 'fair cash value,' as used in St. 1909, c. 490, Part I, § 72, means the amount of cash which could, at the date as of which the assessment is made, be obtained for the property in the open market after fair and reasonable efforts have been made to find a purchaser who will give the highest price for it.

"14. The value of the real estate in question to the petitioner over and above its value to any other owner is not to be included in fixing the 'fair cash value.'

"15. The 'fair cash value' of the real estate in question is no greater than it would be if such real estate were owned by a person to whom the buildings and other improvements were of no use.

"16. The 'fair cash value' of the real estate in question is the value which the petitioner could have obtained for it at the date as of which the assessment is made, if it had then desired to sell said real estate, after fair and reasonable efforts had been made to find a purchaser who would give the highest price for it.

"17. The 'fair cash value' of the real estate in question is the value which it would have had on April 1, 1915, in the hands of any owner.

"18. The 'fair cash value' of the petitioner's property is not its value for the uses of an endowed institution, although, in determining its 'fair cash value,' whatever value may arise from the chance that a purchaser for this use or for any other use might appear may be considered.

"19. The 'fair cash value' of the real estate now in question is not the value to the petitioner, but its value in the hands of any

owner, and in fixing that value, the chance that it may be desired for any particular purpose may be considered.

"20. The 'fair cash value' of the estate for the purposes of taxation cannot exceed the sum which the owner after reasonable effort could, at the date as of which the assessment is made, obtain for it in cash.

"21. If there is a possibility that, by reason of the buildings and other improvements or by reason of the use to which the real estate now in question is put, a person desirous of acquiring property for use as an asylum or hospital would be willing to pay more for such real estate than purchasers in general would be willing to pay, the existence of this possibility is material for the purpose of determining the fair cash value only in so far as it may add something to the fair cash value of the real estate in the minds of purchasers in general.

"22. The 'fair cash value' is not the sum which a person desirous of acquiring property for use as an asylum or hospital might be willing to pay for the real estate now in question but the amount that could be realized at a fair sale in the open market in view of all the uses to which the real estate is reasonably adapted.

"23. The 'fair cash value' of the real estate in question consists of the value of the property in the market apart from its special adaptability for hospital purposes, plus such sum as a purchaser might add to that value because of the chance that the property might at some time be sought for use as a hospital."

The judge made the first ruling requested, and made the rulings numbered respectively 13, 16, 19, 21 and 22, subject to the qualification that the meaning of the phrase "fair cash value" as applied to these cases could not, in his judgment, be expressed in a single sentence. He modified the seventeenth ruling by adding thereto the words "including the present owner" and made that ruling as so modified. He refused to give any of the rulings numbered respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 18, 20 and 23.

The judge adopted the findings of the commissioner as to the facts in each case and filed in the two cases a memorandum reading as follows:

"Undoubtedly there are many cases where the building adds nothing to the value of the land, for the prudent purchaser im-

mediately pulls down the building and puts up an apartment house. But in the present case the buildings are modern and well adapted to their present use, and the owner will continue that use.

"The accepted phrase 'market value' is properly applicable to all cases where there is a market, but that does not mean that monopolies must go untaxed. The taxable value of a railway station is not affected by the fact that so long as the present owner holds the franchise and the tracks, no purchaser would have any use for the building. If a part of the Harvard College yard were to be taken by right of eminent domain, the college could demand compensation for buildings destroyed, although those buildings have but one use and there is and can be but one Harvard College. The frank method of dealing with such a case would be to say that where the prudent owner would immediately replace the building if it were destroyed replacement value furnished the true test. But the conventional method is to retain the old phrase, and to expand its meaning to meet the new demand, and our courts have heretofore shown themselves to be equal to this task.

"In the present case we may assume that the assessors have taxed the land up to its full market value, that is to say, its value for dwelling house purposes, a doubtful method where the land has been dedicated to a single use and the buildings are taxed on the assumption that such use will continue. But on the other hand, they have given to the buildings a value much below their replacement value, and I agree with the commissioner that they have arrived at a fair result."

The judge accordingly ordered that the petition in the first case be dismissed and that costs be taxed as in an action of law; and in the second case he found that the petitioner was assessed and had paid a tax for the year 1916 upon valuations which were in the aggregate \$43,370 more than the fair cash value of the property upon which said tax was assessed and ordered that the tax be abated in the sum of \$806.68 and ordered that judgment be entered therefor with interest from October 30, 1916, the day when the tax was paid, and that costs be taxed as in an action at law.

At the request of the petitioner the two cases were reported to

this court. If there was no error prejudicial to the petitioner in the foregoing rulings, refusals to rule, findings and orders, judgment was to be entered in each case as ordered. If in either case there was error in the rulings, refusals to rule, findings or orders, a new trial of such case was to be had, unless this court should be satisfied that it had before it all the facts necessary for making a final disposition of the case, in which event such judgment was to be entered as this court should direct.

M. Storey, (*H. S. Davis* with him,) for the petitioner.

A. L. Taylor, (*C. P. Richardson* with him,) for the respondent.

RUGG, C. J. These are two petitions under Part I, § 77 of the general tax act, St. 1909, c. 490, appealing from the refusal of the assessors of the town of Belmont to abate taxes alleged to have been assessed illegally for the years 1915 and 1916 respectively upon real estate of the petitioner devoted to the care of the insane under a department known as the McLean Asylum and located in that town. The taxes were assessed pursuant to St. 1914, c. 518, § 1, which amended the exemption from taxation of the personal estate of charitable institutions and their real estate actually occupied for their corporate purposes set forth in the general tax act, § 5, cl. 3, by adding a proviso in these words: "nor shall the personal property or real estate owned by such institutions or corporations and occupied by them or any department thereof wholly or partly as and for an insane asylum, insane hospital, institution for the insane or for the treatment of mental or nervous diseases, be exempt from taxation unless at least one fourth of all property so occupied wholly or partly, on the basis of valuation thereof, and one fourth of the income of all trust and other funds and property held for the benefit of such asylum, hospital or institution and not actually occupied by it for such purposes, be used and expended entirely for the treatment, board, lodging or other direct benefit of indigent insane persons, or indigent persons in need of treatment for mental diseases, as resident patients, without any charge therefor to such persons either directly or indirectly."

The meaning and the constitutionality of St. 1914, c. 518, § 1, are questions which lie at the threshold of the case.

1. The contentions made by the petitioner as to the construction of the statute summarily stated are that the words "without

any charge therefor" in the last clause of the amendment mean in substance, without any charge for the use of the property occupied by the institution or department in question for the purposes stated or for benefits received through the expenditure of the income of trust or other funds and property held for the use of the institution or department and not actually occupied for such purposes, and that the word "therefor" refers to the use of property and income and not to "treatment, board, lodging or other direct benefit." We are of opinion that these contentions cannot be adopted. The word "therefor," according to the approved usages of language, ordinarily refers to the last and not to a more remote antecedent noun or phrase. It is the natural import of the proviso as a whole that the exoneration from charge relates to service rendered or furnished and not alone to use of property or income. The legislative history of the statute appears to disclose a purpose to make a material change respecting the exemption from taxation of property of such charitable institutions. Apparently in its practical working little if any change would result from the construction put forward in behalf of the petitioner. It is difficult and perhaps not desirable to attempt to lay down a precise and technical definition of "indigent persons" such as exists respecting the word "paupers." See *Opinion of the Justices*, 11 Pick. 537. But in a broad sense in this connection "indigent persons" include those insane persons who by reason of poverty are unable, having due regard to other imperative obligations resting upon them, to contribute any substantial amount to their support in the asylum. *Weeks v. Mansfield*, 84 Conn. 544. *In re Hybart*, 119 N. C. 359.

The other parts of the statute present no insuperable difficulty in construction. One fourth of the property occupied wholly or partly for the insane asylum or other designated use, on the basis of valuation, and one fourth of the income from property held for its benefit must be devoted to the direct benefit of indigent insane without charge. This does not of necessity require a physical line of demarcation between the portions of the real estate devoted to pay patients and those given over to the use of free patients. Plainly it does not mean a fractional use of the property based on numbers of patients. It signifies that, on a fair basis of computation, having reference both to numbers of patients

treated so far as concerns enjoyment of property adapted for and applied to a use in common by pay and free patients and to definite property so far as there is a strict separation between pay and free patients, one fourth in value shall be employed for the benefit of the latter. The same method, so far as practicable, may be employed in determining the expenditure of income. The statute is intended to be given a rational construction. Its operation must be adapted to the practical solution of a specified problem. Within these somewhat comprehensive lines, the calculation of the required proportions of properties doubtless can be accomplished without undue friction. The statute does not appear to be an unworkable piece of legislation. *Hemenway v. Milton*, 217 Mass. 230.

2. We are not able to perceive that any constitutional right of the petitioner is infringed by the statute.

The petitioner does not claim that it has any special exemption from taxation as a part of its charter rights. See St. 1810, c. 94. Whatever exemption it heretofore has enjoyed rested upon general law declaratory of a scheme of public policy. That may be changed by the General Court provided no other constitutional guaranty is offended. *Christ's Church v. Philadelphia*, 24 How. 30. *Grand Lodge F. & A. Masons v. New Orleans*, 166 U. S. 143. *Stanislaus v. San Joaquin & King's River Canal & Irrigation Co.* 192 U. S. 201. *Choate v. Trapp*, 224 U. S. 665, 674. The question somewhat argued respecting the ethics of inviting contributions from charitably disposed persons on the footing that the beneficiary of their gifts is to be exempt from taxation, and then revoking that exemption after large gifts have been made, is wholly legislative and not judicial in its nature. It presents no question of constitutional law. The law of taxation may be changed. In the absence of some binding contract, no one has a legal right to the continuance of such laws. *Hanscom v. Malden & Melrose Gas Light Co.* 220 Mass. 1, 8. *Cahen v. Brewster*, 203 U. S. 543.

3. The statute here assailed does not deny to the petitioner the equal protection of the laws guaranteed both by the State and Federal Constitutions. The Fourteenth Amendment to the Federal Constitution secures the petitioner against being singled out either by name or otherwise, directly or indirectly, and subjected to heavier burdens than are imposed upon other like cor-

porations. Reasonable classification so far as concerns taxation or exemption from taxation may be made by the Legislature. The constitutional principles respecting the basis of such classification have been declared in numerous cases. It was said by Chief Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 657, 662: "Nor, in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. . . . And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." In *Southern Railway v. Greene*, 216 U. S. 400, at page 417, occur these words: "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." In *Citizen's Telephone Co. of Grand Rapids v. Fuller*, 229 U. S. 322, at page 329, is found the statement: "The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the Legislature;" and at page 331: "Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney v. New York*, 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule; — its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'"

It is to be borne in mind constantly that the present statute relates only to the conditions under which exemption from the ordinary burdens of taxation is to be granted to certain kinds of charitable corporations. It is not a classification for purposes of taxation but of exemption from taxation. We consider only the question presented and do not undertake to decide whether the statute would be open to successful attack as a classification for taxation.

The classification declared by the present statute is the selection of insane asylums, insane hospitals, and institutions "for the insane or for the treatment of mental or nervous diseases," the separation of these from all other charities and a declaration of different conditions respecting them as compared with other charities. Such a classification on its face is not irrational. The Legislature has for many years made various classifications touching the exemption from taxation of charitable corporations. For example, all the real and personal estate of incorporated agricultural societies is exempted from taxation, while only the portions of the real estate and buildings of incorporated horticultural societies used for their offices, libraries and exhibitions are tax free. Only those portions of houses of religious worship appropriated to such worship and instruction are exempted from taxation. The tax exempt property of incorporated Grand Army posts or veterans' associations is limited to \$20,000, but there is no such limitation upon the value of real and tangible personal estate held for units of the volunteer militia. The Bunker Hill Monument, although owned by a private association (St. 1823, c. 1, and St. 1824, c. 122), has been exempted by name from taxation. Parsonages owned by religious societies used exclusively by their ministers as dwelling houses are not exempt from taxation, although dwelling houses of literary, educational, charitable and scientific institutions and occupied permissively by their officers are so exempt. *Third Congregational Society of Springfield v. Springfield*, 147 Mass. 396. See general tax act, Part I, § 5, cls. 4-7. There are numerous special statutes applying to named charities, rules as to taxation and to tax exemptions differing somewhat in their substance and details from each other and from the general law. Yet it never has been suggested that these are unconstitutional discriminations or preferences. See for example *Northampton v.*

County Commissioners, 145 Mass. 108; *Old South Association in Boston v. Boston*, 212 Mass. 299; *Mount Auburn Cemetery v. Mayor & Aldermen of Cambridge*, 150 Mass. 12; *Harvard College v. Aldermen of Boston*, 104 Mass. 470.

These different provisions, which are in the nature of classifications of charitable corporations for purposes of exemption from taxation, have existed for many years and no contention has been made that they transcended the constitutional power of the Legislature. These statutes have the support of a long and unquestioned usage. Of course this is not decisive. But clear reason is required to upset as contrary to the Fourteenth Amendment a settled system of tax exemptions.

One ground upon which exemptions from taxation of charitable institutions like the petitioner can be justified in a constitutional sense is that they minister to human and social needs which the State itself might and does to a greater or less extent undertake to satisfy. The ultimate obligation of the State thus is discharged by the private charity. To that extent the State is relieved of its burden. *Opinion of the Justices*, 195 Mass. 607, 609. An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government. Appropriations of public funds for charitable uses need not be uniform. Exemptions need not be on the same footing for all, although they cannot be framed upon an arbitrary or discriminatory basis. It is not necessary to cite the many special statutes granting appropriations to certain educational institutions and not to others, the constitutionality of which, so far as we are aware, has not been assailed.

It must fairly be assumed on this record, it seems to us, that the present classification includes only the petitioner and one other institution, the New England Sanitarium, located in the town of Stoneham. The simple circumstance that only two institutions may be included within a tax exemption classification is not conclusive against its validity. It is a factor not to be lightly disregarded. The fundamental question, however, is whether the classification rests upon a rational foundation or is arbitrary, oppressive, whimsical or visionary. The fact that laws are found

to be so fashioned as to be applicable in their practical operation to a single person oftentimes points strongly to a designed inequality and unfair discrimination. *Austin v. Murray*, 16 Pick. 121. *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 103. *McFarland v. American Sugar Refining Co.* 241 U. S. 79, 86. But the present statute does not appear to us to fall within the class illustrated by the cases just cited. A tax statute, although disguised as a classification but in truth designed as revealed by its practical operation to select for hostile discrimination a single person or corporation from other persons or corporations of like legal standing or nature, cannot stand under the requirement for equal laws. But a tax exemption statute which rests upon a rational classification is not to be stricken down merely because affecting a few or even one in its practical operation. Such a classification as is made by the present statute may be thought to bear a reasonable and just relation to a substantial distinction among charities. Insane asylums organized and operated by private corporations may be thought to be different in respect of tax exemption from other charities.

The history of the statute as narrated in the record bears some indication of a discriminatory basis. It affords ground for the argument put forward by the respondent that it was designed to relieve what it terms an injustice arising from the exemption from taxation of so much property within its territorial limits. Manifestly no such relief could have been thought to be afforded provided the statute is workable and can and will be complied with by the petitioner. We think it can be, as already pointed out. Giving due weight to all the arguments urged, however, they do not appear to us to be of countervailing weight. This statute does not establish a clearly hostile discrimination against a particular corporation or person or class outside the limits of general usage, but on the contrary is within a custom respecting classification touching this general subject which long has obtained in this Commonwealth. "The Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237. "Hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity." *Magon v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 295.

County of Mobile v. Kimball, 102 U. S. 691. The power of the General Court with reference to the extent and character of exemptions of charities from taxation is very broad, although not unlimited. Without undertaking further to define the restrictions upon legislative discretion in this particular, it is sufficient to say that we think it cannot be pronounced beyond the power of the Legislature to establish institutions, designed for the treatment and care of those afflicted with mental disease and disorder as a class by themselves among charities for purposes of tax exemption under all the conditions disclosed by this record, even though only two institutions appear to be affected.

4. The reasons already stated seem to us to be sufficient to show that the statute does not deprive the petitioner of its property without due process of law. *Ohio Tax Cases*, 232 U. S. 576, 589. *Brushaber v. Union Pacific Railroad*, 240 U. S. 1, 24, 25. *Metropolitan Street Railway v. New York*, 199 U. S. 1, 46, 47.

5. It follows from the grounds upon which this opinion rests that the petitioner is not deprived of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights of the Constitution of Massachusetts. The removal of an exemption from taxation of the property of a class of charities, unless certain reasonable conditions as to the administration of their charitable functions are observed, does not reach to such deprivation.

6. The taxes in question do not violate the requirements of c. 1, § 1, art. 4 of the Massachusetts Constitution that taxes be "proportional and reasonable." The grounds of decision already elaborated conclude this point. There is nothing at variance with this view in *Perkins v. Westwood*, 226 Mass. 268, and the numerous decisions and opinions there referred to.

7. The general tax act lays down in Part I, § 50, as the guide for assessors, that they "shall at the time appointed therefor make a fair cash valuation of all the estate, real and personal, subject to taxation." "Fair cash value" is also referred to as the standard in § 72, respecting the granting of abatement. In § 47, the duty of assessors touching the valuation both of real and of personal estate of persons who do not bring in lists, is to "estimate its just value." By St. 1909, c. 517, § 3, a penalty is visited on assessors for knowingly valuing property above or below its "full and fair cash value." The words "fair cash value" have come

before the court in several cases for construction and definition. In *National Bank of Commerce v. New Bedford*, 155 Mass. 313, it was said by Mr. Justice Holmes at page 315: "Value refers to exchange. The cash value of an article is the amount of cash for which it will exchange in fact. That amount depends on the opinion of the public of possible buyers, or of that part of it which will pay the most." The thing to be valued in that case was shares of stock in a corporation, and it was said further: "As a rule, the fair cash value of shares having a market is best ascertained by finding the price at which they sell in the market." In *National Bank of Commerce v. New Bedford*, 175 Mass. 257, 262, it was said by Chief Justice Holmes: "But, generally speaking, when a statute requires the 'fair cash value' of property on a certain day to be ascertained, Pub. Sts. c. 13, § 8, it refers to the actual judgment of the public as expressed in the price which some one will pay, not to what the court at a later time may think would have been a wiser opinion. It means the highest price that a normal purchaser, not under peculiar compulsion, will pay at that time to get that thing. *Bradley v. Hooker*, 175 Mass. 142. If the word 'fair' is thought to add a little latitude to the definition and to allow a correction of whatever was the fleeting accident of a moment of panic by the consideration of values on either side of the precise time fixed by the statute, that correction has been made." This case had to do with the value of national bank stock. In *Blackstone Manuf. Co. v. Blackstone*, 200 Mass. 82, the point at issue was the correct rule for the assessment for taxation of a dam, canal and other water power development in Massachusetts applied to a mill in Rhode Island, where also was a small part of the fall. It was said by Chief Justice Knowlton at page 89: "the question before us is, What is the value of the petitioner's property, having reference to any and all the uses to which it is adapted. . . . If conditions in Rhode Island were disregarded, the value of the property in Massachusetts, including with the land and water the fall which the land furnishes, and the dam, pond, canals and other appurtenances, would be estimated in reference to the most profitable uses to which it could be put, and especially its use to furnish power to a mill in Massachusetts, situated near the line of the State of Rhode Island. Inasmuch as it has been joined to the property in Rhode Island and used with the slight

additional fall there to produce a single unit of water power, and inasmuch as it is found that this is the most valuable use to which it can be put, there is no reason why its value should not be considered in reference to the use to which it is adapted, and which is now made of it in connection with the property in the other State." In *Essex Co. v. Lawrence*, 214 Mass. 79, a case respecting the taxation of land with a developed water power, it was said at page 89: "Original cost with deductions, if any, for depreciation, replacement cost and productive power are all legitimate elements bearing upon true value, but no one of them is decisive. The standard established by the law is fair cash value, having reference to any and all uses to which the property is reasonably adapted." In *Lodge v. Swampscott*, 216 Mass. 260, at page 263, occur these words: "The dominant intention of the statute is that property shall for the purpose of taxation be assessed at its fair cash value considered with reference to all the uses to which it may be put by any owner." This is substantially the same language used in *Tremont & Suffolk Mills v. Lowell*, 163 Mass. 283, at page 288, and *Troy Cotton & Woolen Manufactory v. Fall River*, 167 Mass. 517, at page 523, in each of which the point in issue was the rule for the valuation of large manufactories presumably not frequently changing ownership through actual exchange of the property for cash. These statements afford the rules by which to determine the valuation for purposes of taxation of the petitioner's property.

Frequently, in support of principles of general application, decisions in tax cases and in eminent domain cases are cited indifferently. Commonly fair cash value or fair market value affords adequate compensation to an owner whose property has been taken from him by eminent domain, and is the right basis for the assessment of taxes. *Boston Chamber of Commerce v. Boston*, 195 Mass. 338; affirmed in 217 U. S. 189. *Perley v. Cambridge*, 220 Mass. 507, 512, 513. *Smith v. Commonwealth*, 210 Mass. 259. But the rules in the two classes are not always and necessarily the same. There may be instances where the market or fair cash value is small or almost negligible and does not represent indemnity or the "reasonable compensation" required by art. 10 of our Declaration of Rights. *Beale v. Boston*, 166 Mass. 53. *Wall v. Platt*, 169 Mass. 398.

It is possible that taxation cases may arise where, in order to give rational effect to the declared intention of the Legislature, the words "fair cash value" must be given a somewhat more elastic significance than heretofore has been attributed to them. See, for example, taxation of railroad depots and stations, St. 1906, c. 463, Part II, § 79; of land and property owned by street railway companies, *Connecticut Valley Street Railway v. Northampton*, 213 Mass. 54; of underground conduits, poles and wires of electric light and power companies, St. 1909, c. 439, § 1, where there is no right of sale in its ordinary sense. See *Clemens Electrical Manuf. Co. v. Walton*, 173 Mass. 286, 300; S. C. 206 Mass. 215, 221; and *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. But it is not necessary to discuss or decide that point, and no opinion respecting it is expressed.

The law respecting the meaning and means of finding out the "fair cash value" in taxation cases is to be followed in the case at bar. It is manifest, however, that "fair cash value," as applied to land ordinarily must be ascertained by methods different from those applied to cotton, coal or active stocks, which are dealt with daily in the public market and which therefore have an easily determined cash value. Land commonly is not and cannot be sold at a moment's notice. The value of a tract of land for purposes of sale, that is, its fair cash value, is ascertained by a consideration of all those elements which make it attractive for valuable use to one under no compulsion to purchase but yet willing to buy for a fair price, attributing to each element of value the amount which it adds to the price likely to be offered by such a buyer.

8. The statements of the law framed in the several requests for rulings upon this subject presented by the petitioner and numbered 13, 16, 19, 21 and 22 in substance conformed to correct principles. These requests were given by the judge subject to the qualification that the phrase "fair cash value" as applied to the present case could not be expressed in a single sentence. In this respect no error is shown. The numerous requests for rulings demonstrate the necessity of several sentences to express the different considerations to be borne in mind in reaching a result.

9. The petitioner's request for ruling 23 is framed in almost the precise words of a part of the opinion in *Sargent v. Merrimac*,

196 Mass. 171, 174. That case, however, was one for the assessment of damages for a taking by eminent domain, where it was sought to swell what otherwise would have been the damages by a consideration of special adaptability of the land for water supply purposes, a use to which it had not been devoted. In the case at bar the property already was devoted to the uses of an insane asylum, which therefore might be thought its primary and most valuable use. The rejection of the rule put forward in this request cannot be pronounced erroneous under these circumstances.

10. For the same reason there was no error in denying the petitioner's requests 15 and 18 and in the modification with which request 17 was granted. The present use by the petitioner was a factor which ought to be taken into account in reaching a conclusion.

11. The denial of the petitioner's requests 14 and 20 must be treated in connection with the so called "memorandum" filed by the judge. The fair inference from this statement by the judge and his refusals to rule is that the judge did not confine himself to the rules of law already stated, which in cases of this sort restrict the value to an ascertainment based on cash or market value. Requests for rulings 14 and 20 were correct and pertinent to the facts. The denial of these requests combined with the statement made by the judge indicates that an appreciable increment of value might have been added due to the special and peculiar value which the property had to the petitioner above that which it had in the market. It tends to show that he did not confine himself to a consideration of what a prudent person in the position of the petitioner would have given for the property rather than not have bought it, but went beyond a point where there would have been competition among probable buyers into the region of value to the petitioner alone. Following every instruction of law accepted by the judge for his guidance, he still in reaching his conclusion might have increased the full amount which could have been secured for the property in the market by substantial elements of its value to the petitioner alone. In effect this is the same error which arose and was pointed out in *National Fireproofing Co. v. Revere*, 217 Mass. 63, 65. The same fundamental difficulty is illustrated in principle, although from a different point of approach, in *New York v. Sage*, 239 U. S. 57, 61, *Pastoral*

Finance Association, Ltd. v. The Minister, [1914] A. C. 1083, 1088, 1089, and in *Sidney v. Northeastern Railway*, [1914] 3 K. B. 629, 636, 637.

12. The returns of the petitioner made under the general tax act, Part I, § 41, and showing a valuation upon its real estate, were not inadmissible in evidence on the question of value. *Union Glass Co. v. Somerville*, 228 Mass. 202, 204. Returns under another statute referred to in that decision and held inadmissible in *Brackett v. Commonwealth*, 223 Mass. 119, 126, have no application to the returns here in question.

13. The list presented by the petitioner, sworn to before a notary public was sufficient under the general tax act, Part I, § 43. It hardly can be said that the petitioner was not a person absent from Belmont. *Sears v. Nahant*, 215 Mass. 329, 332. See *Collector of Taxes of Boston v. Mt. Auburn Cemetery*, 217 Mass. 286.

14. It cannot be affirmed on this record that the errors of law may not have affected injuriously the rights of the petitioner. It is the duty of a tribunal charged with the finding of facts to weigh the evidence guided by correct rules of law. It follows that the case must stand for further hearing in the Superior Court. *John Hetherington & Sons, Ltd. v. William Firth Co.* 210 Mass. 8, 18. *Atlantic Maritime Co. v. Gloucester*, 228 Mass. 519, 523.

So ordered.

EASTERN FUR AND SKIN COMPANY vs. HENRY STERNFELD &
others, TRADESMEN'S NATIONAL BANK, claimant.

Suffolk. March 11, 1919. — June 19, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Trustee Process, Rights of claimant.

After a warehouse corporation, which was an alleged trustee in an action of contract against a non-resident defendant upon whom no service was made, had answered, denying that it had goods, effects or credits of the defendant in its hands or possession at the time of service of the writ upon it, interrogatories were propounded to it by the plaintiff, in answers to which it disclosed that, a few hours before the service of the writ upon it, goods of the defendant were transferred by it upon

the defendant's order to a certain bank. Three months later the bank filed a petition to be admitted as a party claimant which was allowed on the same day, and also on the same day filed a motion that the trustee be discharged. The motion was heard upon the pleadings, the interrogatories and the answers thereto and, nineteen days after it was filed, was allowed and the trustee was discharged. The plaintiff alleged exceptions and appealed. *Held*, that the claimant rightly was permitted to move that the trustee be discharged.

It appeared that the answers of the alleged trustee, above described, were based somewhat upon hearsay and upon information and belief. The plaintiff did not seek to introduce further evidence. *Held*, that, although facts stated in answers to the interrogatories upon information and belief did not bind the plaintiff nor preclude him from showing their falsity, such answers were entitled to consideration and that, in the absence of any evidence to contradict them, the trustee properly was discharged.

CONTRACT, begun by trustee process against non-residents, upon whom no personal service was made. Among other alleged trustees was the Lynn Storage Warehouse Company. Writ dated October 4, 1917.

The answers of the Lynn Storage Warehouse Company to interrogatories propounded by the plaintiff, described in the opinion, were filed on January 12, 1918. On April 18, 1918, a petition of the Tradesmen's National Bank to be admitted as a party claimant, was filed and allowed. A motion by the claimant, that the trustee Lynn Storage Warehouse Company be discharged, also was filed on April 18, 1918, was heard by *Wait, J.*, upon the pleadings and the interrogatories and the answers thereto, and was allowed on May 7, 1918: The plaintiff alleged exceptions, and appealed.

L. A. Mayberry, (*J. A. Locke* with him,) for the plaintiff.

R. G. Dodge, for the claimant.

RUGG, C. J. This is an action of contract. The defendants are non-residents, upon whom no personal service has been made. The Lynn Storage Warehouse Company amongst others was summoned as trustee. It filed an answer to the effect that it had no goods, effects or credits of the principal defendants in its hands at the time of the service of the writ. It answered certain interrogatories propounded by the plaintiff. Thereafter the Tradesmen's National Bank of Philadelphia was admitted as a claimant, in its own right and adversely to the plaintiff, to certain goat-skins in the hands of the warehouse company.

The answers to interrogatories showed that the principal de-

fendants stored with the warehouse company certain goatskins in July, 1917, and non-negotiable warehouse receipts were issued to them; that "About noon on Oct. 4, 1917, somebody purporting to act for Sternfeld, Weil and Company [the defendants] requested that receipts for the lots of goatskins heretofore referred to, be sent to the Tradesmen's National Bank of Philadelphia, and upon being informed that the warehouse would not do this until the outstanding receipts had been surrendered, an appointment was made to meet D. J. Monaghan, manager of the warehouse at 1:15 P. M. The appointment was kept at 1:15 P. M."

"An agent purporting to come from Sternfeld, Weil and Company surrendered the receipts saying that the skins represented thereby were transferred to the Tradesmen's National Bank of Philadelphia, and requested warehouse receipts covering such goatskins be issued to said Tradesmen's National Bank of Philadelphia;" that new warehouse receipts in the name of the Tradesmen's National Bank were issued and it has paid storage charges to the warehouse company. The precept in the present action was served upon the warehouse company as an alleged trustee at fifty minutes past four o'clock on the afternoon of the same day. The bank as claimant moved that the warehouse company be discharged as trustee. No evidence was introduced by any party except the trustee's answer and its answers to interrogatories and the case was heard on these alone.

The alleged trustee rightly called the attention of the court to the claim of the bank to the property in question. It was proper to admit the bank as a claimant. *Wardle v. Briggs*, 131 Mass. 518. The alleged trustee is merely a stakeholder and has no further interest in the proceeding, when once the plaintiff and all the claimants are before the court, except to see that he is put in no worse position by reason of the trustee proceeding than he would have been if it had not been instituted. *Cavanaugh v. Merrimac Hat Co.* 213 Mass. 384.

The claimant rightly was permitted to move that the trustee be discharged on its answers. A claimant is not precluded from showing that there is no fund in the hands of the alleged trustee. This point is settled by *Wilde v. Mahaney*, 183 Mass. 455, where earlier cases are reviewed.

On the answers of the trustee, it was discharged rightly. Its

answers were based somewhat upon hearsay, upon information and belief. Such answers when made fairly are entitled to consideration in a proceeding like the present. *Fay v. Sears*, 111 Mass. 154, 156. *Seward v. Arms*, 145 Mass. 195. *Cox v. Central Vermont Railroad*, 187 Mass. 596, 602. Statements by the trustee merely upon information and belief do not bind the plaintiff, or prohibit him from showing the facts. *Mortland v. Little*, 137 Mass. 339, 341. The plaintiff did not seek to introduce further evidence on the point whether the apparent transfer of the goatskins to the claimant was colorable or genuine. In the absence of any evidence beside that which was disclosed by the answers of the trustee, the trustee ought to have been discharged. *Jordan Marsh Co. v. Hale*, 219 Mass. 495. Manifestly there are numerous legitimate transactions whereby the bank might have become the owner of the property, even though not retaining all the while the possession of it. *Peoples National Bank v. Mulholland*, 224 Mass. 448, 451; *S. C.* 228 Mass. 152, 155, and cases collected.

Exceptions overruled.

Order discharging trustee affirmed.

GENEVIEVE PROCTOR vs. WILLARD P. LOMBARD, trustee,
& others.

Suffolk. March 10, 1919. — June 20, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Husband and Wife, Separation agreement. *Contract*, Construction, Performance and breach, Modification, Abandonment.

Where a separation agreement between a husband and his wife and a third person as a trustee provided for payments by the husband to the trustee for the benefit of the wife of \$55 per month, and the payments for a time were in the sum of \$30 per month but there was no specific agreement on the wife's part that such payments should be accepted in full satisfaction of the requirements of the agreement, it cannot be ruled as a matter of law, in a suit in equity for the enforcement of the agreement, that the payments of less than the sum stated in the agreement were accepted as full satisfaction and not merely as part payments. A letter by the wife to the trustee, under the agreement above described, reading as follows: "In view of the circumstances pertaining to the case, I feel that I no

longer require your service and release you of your duties of Trustee, and request that my monthly allowance of Thirty Dollars, (\$30.00) be sent to me at my home address. . . . In accordance to the above, would kindly ask that you return all papers which you have in your possession, in connection with the case, to me," while it well might discharge the trustee as the wife's attorney, cannot as a matter of law be said to have terminated her rights under the agreement, especially where it appears that after writing the letter the wife continued to receive monthly payments from her husband.

A provision of the agreement above described was, "The said wife shall not institute any action or civil process or criminal action whatever against the said husband on the ground of non-support for necessities." On March 7 of a year when the agreement was in force, the wife brought in the Probate Court a petition for separate maintenance, upon which there never was a hearing, and which was dismissed without prejudice by agreement of the parties on the tenth day of the next month. The suit to enforce the agreement was brought the following August. *Held*, that it could not be said as a matter of law that the wife had forfeited her rights under the agreement by the bringing of the petition in the Probate Court.

A paragraph of the agreement above described provided in substance that proceedings to enforce the agreement should be brought by the trustee, and that, if the trustee refused or neglected to do so, either the husband or the wife might do so in the trustee's name. The trustee failed and neglected to enforce the agreement for the wife, and resisted, acting in behalf of the husband and as his attorney, her attempts to maintain her rights under it. The suit for enforcement, above described, was brought by the wife in her own name against the trustee and the husband. The wife was entitled to have the agreement enforced. Upon an appeal by the defendants from a decree in favor of the wife, it was *held*, that the wife should have leave to amend the bill by substituting the name of the trustee as plaintiff and that then the decree should be affirmed.

BILL IN EQUITY, filed in the Superior Court on August 23, 1918, to enforce a separation agreement between the plaintiff, the defendant George M. Proctor, her husband, and the defendant Willard P. Lombard, who acted as trustee in the agreement; and to reach and apply to the payment of \$1,080, alleged to be due to the plaintiff under the agreement, shares of stock in the defendant Hudford Truck Company, alleged to be owned by the defendant Proctor.

The agreement was dated July 17, 1915, and, among other things, provided for the payment of \$55 each month by the husband to the trustee for the benefit of the wife. A part of the sixth paragraph of the agreement read as follows: "The said wife shall not institute any action or civil process or criminal action whatever against the said husband on the ground of non-support or for necessities." The tenth paragraph, relating to methods of enforcement, is quoted in the opinion.

The suit was heard by *Chase, J.*, and the testimony was taken by a commissioner appointed under Equity Rule 35. The letter of the plaintiff to the defendant Lombard, mentioned in the opinion, read as follows: "In view of the circumstances pertaining to the case, I feel that I no longer require your service and release you of your duties of Trustee, and request that my monthly allowance of Thirty Dollars, (\$30.00) be sent to me at my home address. (62 Clarendon St., City.) In accordance to the above, would kindly ask that you return all papers which you have in your possession, in connection with the case, to me."

Other material evidence and findings of the judge are described in the opinion.

By order of the judge a decree was entered ordering the defendant Proctor to pay to the defendant Lombard for the benefit of the plaintiff the sum of \$1,300 and interest and costs. The defendants appealed.

W. W. Stover & E. L. Sweetser, for the defendants, submitted a brief.

S. Gottlieb, for the plaintiff.

DE COURCY, J. In July, 1915, a separation agreement was entered into between the plaintiff and her husband, George M. Proctor, through the intervention of the defendant Lombard as trustee. This suit was brought to enforce the agreement, and to reach and apply certain property of the husband.

At the trial in the Superior Court he contended, among other defences, that the agreement had been modified and abandoned by the plaintiff, and also that she had broken the agreement on her part. The judge, however, found "there has been no repudiation or abandonment of the indenture by the petitioner, or modification thereof, and the same continues in force." We cannot say that the findings were not warranted by the evidence. It could be found that the payments for a time of \$30 a month were accepted as part payments of the amount stipulated in the agreement. The plaintiff's letter to the defendant Lombard might well discharge him as her attorney without terminating her rights under the separation agreement: and in fact she continued to receive monthly payments after writing the letter.

Nor can we say as matter of law that the petitioner forfeited her rights by bringing a petition for separate maintenance in the

Probate Court after her husband's failure to make monthly payments. That petition was filed on March 7, 1918, there never was a hearing thereon, and on April 10, 1918, it was dismissed without prejudice by agreement of parties.

It is expressly provided in the separation agreement: "Tenth: The trustee above named, or his successor, may take and begin any legal proceedings which shall be necessary and proper to maintain and enforce the rights and obligations of the husband or the wife under this indenture upon application by the other for that purpose, being indemnified from any cost or expense by the party making such application and in case the trustee shall for any cause refuse or neglect to take or begin such proceedings, said husband and wife, and each of them, shall have the right to take and begin such proceedings in the name of the said trustee or his successor for the benefit and at the expense of the moving party." The trial judge found: "The defendant Lombard has failed and neglected to institute proceedings to enforce the obligations of the defendant, George M. Proctor, as to payments for the separate support of said plaintiff, and has resisted, in behalf of said George M. Proctor, acting as his attorney, the plaintiff's attempts to maintain her rights in that respect." Accordingly, without considering the right of the plaintiff to enforce the agreement in her own name in the absence of the above provision, she is given leave to amend the present bill by substituting the name of the trustee as plaintiff, and thereupon the decree is to be affirmed. St. 1913, c. 716, § 3.

So ordered.

HIPPODROME AMUSEMENT COMPANY vs. IGNATZ WIT.

Suffolk. November 22, 1918. — June 23, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

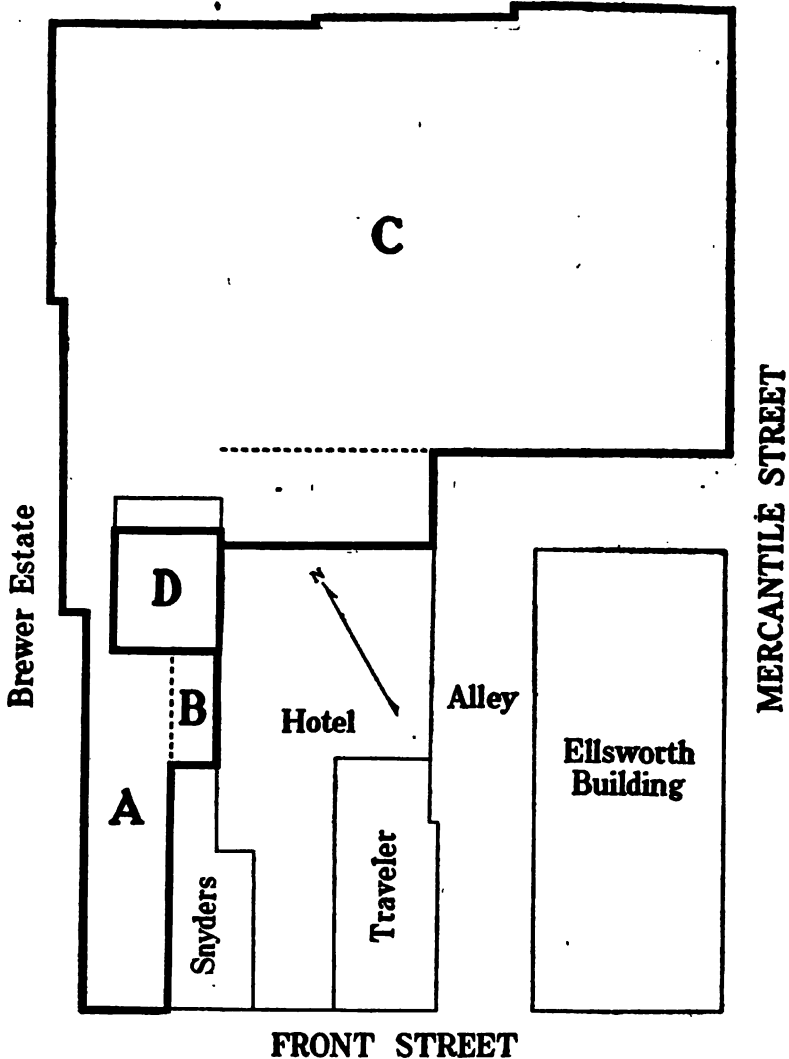
Landlord and Tenant, Construction of lease. *Contract*, Construction, Validity. *Equity Jurisdiction*, To avoid unconscionable contract.

A lease for a term of thirty-two years of four parcels of land in a city, denominated in the lease by reference to a sketch plan as lots A, B, C and D, provided for a

fixed rent for parcels A and B, and that the rent to be paid for lots C and D should be nine per cent of the valuation of those lots as assessed by the proper authorities of the city "or those having the power in the premises to value said land for the purpose of taxation." Lots A and B, which comprised about one third of the area of the four lots, were contiguous to a principal street of the city, and, dissociated from the other lots, had a value of about \$30 per square foot. The other two lots, away from the street, had a value, if dissociated from lots A and B, of \$5 per square foot. In the negotiations leading up to the lease, all parties knew that there was a great difference in value between the two groups of lots. The assessors of the city before the making of the lease had assessed the four lots together as a part of a larger parcel at \$12 per square foot, which, as a uniform rate for all four parcels, was a reasonable assessment. The lessee sought to have the assessors assess lots C and D separately. The lessor objected to this being done, and the assessors refused to do it in the face of the objection. The lessor claimed as rent of lots C and D nine per cent of the valuation at \$12 per square foot. The lessee, asserting that such a rent was unconscionable and was not intended by the parties, brought a bill in equity seeking to enjoin the lessor from interfering with the assessors' assessing the lots C and D separately, to have the court determine, "by special assessment or otherwise," the fair assessable value of lots C and D, and to have an accounting as to rents paid and to be paid. *Held*, that the bill must be dismissed as the plaintiff executed the contract voluntarily and deliberately with knowledge of the facts and without any misrepresentation or fraud on the part of the lessor and therefore was bound by its plain provisions.

BILL IN EQUITY, filed in the Superior Court on February 20, 1917, alleging that the plaintiff and the defendant on March 23, 1914, entered into a leasehold agreement whereby the defendant let to the plaintiff for a period of thirty-two years the lots marked A, B, C and D on an accompanying plan, a copy of which is printed on page 218, a fixed rent being agreed upon as to lots A and B, as to which there was no dispute; that the provision as to the rent to be paid for lot C was as follows: "For said Parcel C a yearly rental of a sum equal to nine (9) per cent of the valuation of said Parcel C as assessed by the proper authorities of the City of Worcester or those having the power in the premises to value said land for the purpose of taxation, such percentum to be based on such tax valuation as of April 1 in each year for the year ending the following March 31, and if the assessment date shall hereafter be changed, then the rental year shall begin as of such assessment date;" and that the provisions as to lot D were as follows: "The land upon which said kitchen stands [Lot D] is now under lease to persons other than this Lessee. If the Lessee herein named secures a cancellation of said lease so far

as it relates to the said land upon which said kitchen stands, then said land upon which said kitchen stands is hereby demised and let to this Lessee from the date of such cancellation during the re-



mainder of the term hereby created, to wit, to March 31, 1946, and is hereby referred to as Parcel D, and rent therefor shall be paid at the same rate as provided above as to Parcel C."

The plaintiff further alleged that Front Street, shown on the

plan, was one of the principal business streets of Worcester and that the land on the street was of large rental value and that land at a considerable distance from it, as were lots C and D, was of much less rental value; that it was contemplated at the time of the making of the agreement that certain buildings on the premises should be torn down and a theatre building erected on lots C and D.

Further allegations were that, previous to the execution of the agreement, the assessors of taxes of Worcester had assessed the land, including lots A, B, C and D and other and adjoining land, all being owned by one person, as one parcel; that, in order to ascertain what the fair and proper rent of the parcels C and D was, under the terms of the lease, it was necessary that they be assessed separately from the rest of the land; that the plaintiff had tried to get the assessors to make such a separate assessment of lots C and D, and that the defendant had requested them not to make such separate assessments and had taken active measures to prevent any such separate assessment being made, and that he, the defendant, contended that he was entitled to rent under the agreement based on the old valuation per square foot; that for the defendant to collect such rent was "a direct violation of the provisions of said lease," but that, if he was successful in preventing the separate assessment of lots C and D, he might be able to compel the plaintiff to pay as rent "a much higher rate than is just and equitable and that was contemplated and provided for in the said lease itself."

It also was alleged that the assessors were willing to make a separate assessment of lots C and D, but that they asserted that they were requested not to do so by the defendant and that they did not wish to make any such special assessment in the face of the defendant's objections.

The prayers of the bill were that the defendant might be directed to cease from interfering in the matter and to consent to a special assessment being made of said lots C and D by the assessors; that the court should determine, by special assessment or otherwise, the fair assessable value of lots C and D from the date of the lease to April 1, 1917, the date of the next assessment by the assessors of Worcester; that, after such value had been ascertained by the court or otherwise, an accounting might be had to

determine whether the defendant had been overpaid in the matter of rents paid for lots C and D, and, if so, to what amount; and for general relief.

The suit was heard by *Jenney, J.* He found in part as follows:

"The land included in lots D and C was at the time of the execution of the lease fairly worth \$5 per square foot, and said land has not increased in value since that time. The front land, such as is included in lot A, is worth about \$30 per foot separately and apart from the rear land. All parties in the negotiations which led up to the lease to the plaintiff knew that the front land was of much greater value than the rear land, but there was no evidence as to just what figures of value were in their minds.

"Beyond preparation of plans, the plaintiff did nothing toward the actual construction or erection of said theatre building until some time in the year 1916. It then began the erection of said building and the same was substantially completed when the bill was filed. The theatre building is so constructed as to be used in connection with the entrance thereto from Front Street over lot A; and the structure on said lot is adapted for and used only as an entrance to the theatre.

"The entire tract of land held by the defendant (under his lease from Leland) contains 13,122 square feet, and prior to this lease to the plaintiff this land had been assessed as a whole and at the uniform rate of \$12 per square foot. I find that that rate was a reasonable assessment per square foot for the entire area, as a large part, nearly two-thirds of the total area, was back land."

"Wit personally and by solicitation of others endeavored to prevent the plaintiff's representatives from getting this separate assessment. He claimed to the assessors that he was the lessee of the entire property under his long lease and that it had always been assessed as one piece and should continue so to be assessed. Mrs. Kent, then the owner of the entire parcel, although under no obligation to pay any taxes on the property during the entire period of her lease to Wit, a matter of over thirty years, protested against any division of the lot for the purposes of assessment. I find that Wit's object in endeavoring to prevent a separate assessment of the rear land was, first, that he might very greatly increase the amount of rental to be collected by him upon lots C and D, and second, that he might impose upon the plaintiff a

much larger proportion of the total annual taxes on the entire real estate than the plaintiff under the terms of the lease would bear in case of a separate assessment."

Other material findings of the judge are described in the opinion.

The judge ordered a decree that the bill be dismissed and, at the request of the plaintiff, reported the case with his findings of fact, but without a report of the evidence, to this court for determination.

The case was argued at the bar in November, 1918, before *Rugg, C. J., Loring, Braley, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices.

F. N. Nay, (*M. L. Levenson* with him,) for the plaintiff.

A. K. Cohen, (*H. A. Mintz* with him,) for the defendant.

BRALEY, J. While the lease dated March 23, 1914, does not in terms refer to the sketch plan the bill alleges and the answer admits that the plan was followed in the description of the leasehold and the apportionment of the rent. It is apparent from the plan, on which the areas do not appear, that the demised premises comprise an entire tract divided into contiguous parcels, which are respectively designated as A, B, D and C and of which only parcel A abutted on a public way. The trial judge finds that at the execution of the lease this parcel, which is referred to by him and by counsel as "front land" had a value of about \$30 a square foot, while parcels C and D or the "rear land" were each worth only \$5 a square foot. But he also states that while the parties during the negotiations preceding the lease knew that the front land was of much greater value than the rear land, there was no evidence before him showing any estimate of valuation on which either party acted. The inquiry would be of little moment if it were not for the provisions of the lease which, instead of naming a round sum as a yearly rent for the entire leasehold, treats the parcels as if each parcel was a separate demise. The rent reserved for parcels A and B, concerning which there is no dispute, is a fixed yearly amount based on a graduated scale during the term and the lessor pays the taxes on lot A. But for parcel C, and for parcel D, subsequently acquired by the plaintiff as provided in the lease, the lessee covenanted to pay a yearly rent equal to nine per cent of the valuation of the parcels as assessed by the proper authorities of the city, "or those having the power in the premises

to value said land for the purposes of taxation, such percentum to be based on such tax valuation as of April 1, in each year for the year ending the following March 31, and if the assessment date shall hereafter be changed, then the rental year shall begin as of such assessment date." While parcel C at the date of the lease was vacant land, the plaintiff as contemplated by the lease, has erected thereon a building to be used by it as a theatre, access to which by the public is over parcel A in connection with parcels B and D, and at the termination of the lease the building is to become the property of the lessor.

It appears from the record that the entire tract held by the defendant as the lessee of one Leland contains thirteen thousand one hundred and twenty-two square feet, while the premises demised to the plaintiff exclusive of lot A comprise eight thousand ninety-one square feet of which lot D has an area of three hundred and sixty and lot C an area of seven thousand six hundred and seven square feet.

The defendant demands rent for lots C and D on the basis of the taxable valuation of \$12 per square foot, at which as a uniform rate the judge found that the land as a whole had been assessed to the defendant before the plaintiff's lease and that "that rate was a reasonable assessment per square foot for the entire area, as a large part, nearly two-thirds, of the total area, was back land." The evidence is not reported, and this finding as well as the further finding that the total rent of lots C and D from the beginning of the term to and including March 31, 1917, computed at nine per cent on the valuation of the land as assessed prior to the lease at \$12 a square foot, amounts to \$42,994.11, of which sum the plaintiff has paid \$36,460.13, leaving a balance due when the bill was filed of \$6,533.98, cannot be disturbed. The bill, however, alleges and the plaintiff contends that in order to determine the fair and proper rent it is necessary that the assessors should make a separate assessment of lots C and D with the buildings thereon, and it is found that although so requested by the plaintiff, the assessors have declined to make a separate assessment because the owners of the reversion as well as the lessor decline to acquiesce in any division of the premises.

The plaintiff being confronted with this situation asks that the defendant may be decreed to consent to a "special assessment

being made of . . . lots C and D . . .” or that the court “shall determine, by special assessment or otherwise, the fair assessable value . . . from the date of said lease to April 1, 1917, the date of the next assessment by the assessors . . .” If the plaintiff under the wording of the covenant is within the grip of a bargain which it now maintains is extremely burdensome and unduly advantageous to the lessor, the hardship arises as shown by the record from its voluntary and deliberate act in executing the lease, and not from any misrepresentation or fraudulent conduct of the defendant.

It is plain that the rent is to be ascertained on the valuation of the leasehold as a whole or in parts which may change from year to year as the assessors in the performance of their duties as public officers may in their own judgment determine. *Wall v. Hinds*, 4 Gray, 256, 269. And, finding no error in the computation previously stated of the amount due from the plaintiff to the defendant, a majority of the court are of opinion that a decree in accordance with the terms of the report should be entered dismissing the bill.

Ordered accordingly.

ROBERT M. MORSE & another, trustees, vs. WILLIAM J.
STOBER & others.

Suffolk. March 14, 1919. — June 23, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, Specific performance. Mortgage, Foreclosure. Soldiers' and Sailors' Civil Relief Act. Equity Pleading and Practice, Reservation.

A title to real estate, not a good title of record, may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance of the real estate which does not expressly require a conveyance of a good title of record will be enforced in equity.

While the only way in which a mortgagee under a Massachusetts statutory power of sale mortgage of real estate, in purchasing the property at a sale in foreclosure of his mortgage, can get a clear record title while U. S. St. 1918, c. 20, § 302, known as the Soldiers' and Sailors' Civil Relief Act, is in force is, as decided in *Hoffman v. Charlestown Five Cents Savings Bank*, 231 Mass. 324, to foreclose

the mortgage under an order of a court of equity as therein described, nevertheless it is not impossible that, if such a mortgagee, after purchasing the real estate at a foreclosure sale without such an order of a court, made a contract in writing to convey the real estate, he may be able to maintain a suit in equity for the specific performance of such contract by proving beyond a reasonable doubt that no person in the military service of the United States had any interest, legal or equitable, in the premises in question.

Where, in such a suit, the plaintiff alleged that no person in the military service of the United States had any interest in the premises, and there were included as defendants, besides those who had agreed to purchase the real estate, all persons whose names appeared of record as having any interest in the premises since August, 1915, and all the defendants except one, against whom the bill was taken *pro confesso*, admitted the allegations of the bill, upon the suit being reserved for determination of this court upon the bill and answers, it was held, that, no evidence having been presented, the suit must stand for a hearing of the question of fact, whether any person in the military service of the United States had any interest in the premises in question.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 21, 1918, and afterwards amended, for specific performance of a contract to purchase real estate.

The pleadings are described in the opinion. The suit was reserved by *De Courcy, J.*, upon the amended bill and answers for determination by the full court.

C. S. Rackemann, (J. Noble with him,) for the plaintiffs.

J. D. Graham, for the defendants.

RUGG, C. J. This is a suit in equity praying for the specific performance of an agreement to buy real estate. The question is, whether the plaintiffs are able to convey "a good and clear title thereto free from all incumbrances" except certain taxes and party wall agreements. The pertinent facts are, that the plaintiffs, being the holders of a first mortgage in the common form containing the statutory conditions and the statutory power of sale created by St. 1912, c. 502, made entry in due form to foreclose the mortgage on August 5, 1918, certificate whereof was seasonably recorded, and without order of court sold the premises in accordance with the power at public auction on September 4, 1918, all for breach of the condition of the mortgage, and became themselves the purchasers at the foreclosure sale. A deed in the usual form was executed and recorded. A contract of sale thereafter was made between the plaintiffs and the defendants Holdsworth and Farrington. The latter refuse to carry out the contract and accept the deed on the ground that the foreclosure was not

made in pursuance of an order of court as provided by § 302, cl. 3, c. 20 of Act of Congress approved March 8, 1918 (40 U. S. Sts. at Large, 444), known as the Soldiers' and Sailors' Civil Relief Act.

The affidavit of sale made and filed in accordance with the power of sale set forth that the owner of the equity of redemption was not in the military service of the United States. Three persons, being all whose names appear of record as having had an interest in the premises in question since August, 1915, a date antecedent to the entry of the United States into the great war, are joined as defendants and it is alleged that no persons other than these have any legal or equitable interest in the premises. The bill has been taken for confessed against one of these three defendants, and the other two have answered that they have never been in the military service of the United States and have no interest in the premises. The answer of the defendants Holdsworth and Farrington admits all the allegations of fact in the bill and that, according to their information and belief, no party interested in said premises was in the military service of the United States as defined in said act of Congress; but it avers that because the power of sale to foreclose the mortgage was not exercised under and by authority of a court as required by said act of Congress, the plaintiffs cannot give a good and sufficient title to the premises, and that therefore specific performance of the agreement ought not to be enforced.

The meaning of a good and clear and sufficient title is settled in this Commonwealth by repeated decisions. It was said by Knowlton, J., in *Conley v. Finn*, 171 Mass. 70, at page 72, summarizing the effect of numerous earlier cases there collected: "The general rule is, that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt. . . . But the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract. . . . In *First African Methodist Episcopal Society v. Brown*, 147 Mass. 296, 298, Mr. Justice Devens says of the doubt which will relieve a purchaser of real estate from his obligation specifically to perform his contract, that it 'must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his

money. It would be seldom that a case could occur where some state of facts might not be imagined which, if it existed, would defeat a title. When questions as to the validity of a title are settled beyond reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made. . . . It would be often practically impossible for a party to negative all objections which might be imagined, and which, if they existed, would defeat his title.'” In *Close v. Martin*, 208 Mass. 236, at page 239, it was said: “When the defendant insisted upon a title which the attorney could absolutely guarantee never would cause him trouble, he asked for a better title than equity requires a purchaser to accept. A title which is good beyond a reasonable doubt is a title which equity requires a purchaser to take.” *Foster, Hall & Adams Co. v. Sayles*, 213 Mass. 319, 321. In the application of these principles it has been held that a defect in title which had been cured by disseisen might be found good and marketable, *Aroian v. Fairbanks*, 216 Mass. 215, and that the condition of a bond, secured by mortgage, although undischarged of record, had been fully performed. *Shanahan v. Chandler*, 218 Mass. 441.

A title not good on the record thus may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance will be enforced in equity. The contract here in suit did not call for a title clear and perfect on the record of the registry of deeds: The rights of the parties to the suit now at bar must be determined according to these well settled principles.

The act of Congress does not require in terms that all mortgages upon real estate be foreclosed under order of court. Grave constitutional questions might lie in the way of an act of such sweep. It does provide that “No sale under a power of sale” to enforce an obligation originating prior to the date of the approval of that act of Congress, “and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service [as defined in the act] at the commencement of the period of the military service and still so owned by him, . . . shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted

by the court and a return thereto made and approved by the court."

It was held in *Hoffman v. Charlestown Five Cents Savings Bank*, 231 Mass. 324, decided last November, that the act of Congress applies to equitable as well as legal interests constituting property in real estate and owned by a person in military service, without limitation as to use or amount, whether known to the mortgagee or not and whether appearing of record or not. The act of Congress in this regard takes no account of our statutes as to registration of deeds. The foreclosure of a mortgage by sale under a power of sale affecting any such property right of a person in military service, is forbidden by the act unless made under order of court as therein provided. It further was said in that opinion, "Clause 3 of § 302 was enacted to secure to every person in the military service of the United States who owns property subject to a mortgage within the act the relief to which he is entitled under the act. The defendant has urged against this construction of the section, that if that be the true construction of it the result is that until the termination of the time specified in the act no mortgage can be foreclosed by any mortgagee except under an order of court and it cannot be that that was the intention of Congress. We are of opinion that this is the result of the true construction of the act, for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act. We are of opinion, that since this is the result of the true construction of the act, this must be taken to have been the intention of Congress."

'This construction of the act of Congress (in the absence of a contrary decision by the Supreme Court of the United States) must be accepted as sound. It does not mean, however, that in all cases it is and must be impossible to satisfy a court of equity beyond a reasonable doubt that no person in the military service of the United States had any interest in the property subject to the mortgage which has been foreclosed. The meaning of the decision in *Hoffman v. Charlestown Five Cents Savings Bank* is that the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack under the said act of Congress, and therefore in that way alone

can he be certain that the foreclosure of his mortgage will not be made in violation of that act of Congress. But it is not a proposition unprovable in the nature of things or practically impossible to show beyond doubt in a court of equity that no person in the military service of the United States had an interest in the premises described in a mortgage foreclosed without order of court.

A mortgagee who forecloses his mortgage under the power of sale therein contained, without an order of court during the time specified in said c. 20 of the act of Congress, known as the Soldiers' and Sailors' Civil Relief Act, assumes a heavy burden of proof when he undertakes to enforce specific performance of his agreement to convey by good title the land so foreclosed. But it is not a burden of proof incapable of being sustained as matter of law. Circumstances attendant upon the history of a particular title and its record owners may be such as to exclude every rational hypothesis compatible with the notion that a person in the military service of the United States has an interest in it likely to be affected by the foreclosure. Evidence may make it clear beyond a reasonable doubt that no such person has any interest in specified real estate. The allegations of the present bill, to the effect that no person in the military service of the United States has an interest in the premises, in the nature of things is or may be susceptible of legal proof.

The question, whether in truth a person in the military service of the United States had any interest in the premises which are the subject of the present suit, was one of fact and not of law. *Shanahan v. Chandler*, 218 Mass. 441, 443, 444. Its decision depends upon the hearing and weighing of evidence. No evidence has been presented. The case is reserved merely upon the bill and answers. It follows that the case must stand for hearing. If the plaintiffs succeed in maintaining the burden of proof and demonstrating to the satisfaction of the court that no person in the military service had any interest in the property according to the principles heretofore stated, then they will be entitled to a decree; otherwise, the bill must be dismissed.

Case to stand for hearing.

PHILOMENA CRUDO vs. GEORGE B. MILTON (afterwards HENRY S. MILTON & another, executors).

Suffolk. May 19, 1919. — June 23, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Landlord and Tenant; Landlord's liability to member of tenant's family, Common passageway. *Negligence*, Of one controlling real estate. *Evidence*, Competency.

In an action of tort against the owner of a certain tenement by the wife of a tenant for personal injuries, received when the plaintiff was passing through a cellar to go to a water closet and caused by the falling upon her of the flooring and beams which comprised the ceiling of the cellar, there was evidence tending to show that the water closet was used by all the tenants in the building and that the cellar was a common passageway to and from it, that the flooring which fell was the floor of a room occupied by a tenant as a barber shop, that the timber had become rotten and unsafe due to a leak in a sink in the barber shop, and that this condition had been called to the attention of the defendant's agent about a month and a half before the accident. *Held*, that there was evidence warranting a finding that, through negligence of the defendant, the flooring above the cellar had become unsafe and dangerous and not in as good a condition as it was or appeared to be in when the plaintiff's husband became a tenant, and that a verdict for the plaintiff was warranted.

At the trial of the action described above, testimony of the agent in charge of the premises for the defendant, to the effect that after the accident he repaired the beams and flooring of the cellar, was *held* to have been admitted properly as tending to show that the defendant had control of the cellar, that being a matter in dispute.

TORT for personal injuries alleged to have been suffered by the plaintiff when passing to a water closet through a cellar, used in common by the tenants of a building, owned by one George B. Milton, originally the defendant in the action. Writ dated January 5, 1917.

In the Superior Court the action was tried before *Fessenden, J.* The evidence and certain exceptions to testimony of the defendant's son are described in the opinion. At the close of the evidence, the defendant asked for rulings, in substance that the plaintiff was not entitled to recover and that the defendant was entitled to a verdict. The rulings were refused. The jury found for the plaintiff in the sum of \$1,500.

Subsequently to the verdict the defendant died, and the executors of his will were admitted to defend the action in his stead. They alleged exceptions.

The case was submitted on briefs.

J. J. Higgins, for the defendants.

R. W. Frost & M. B. Breath, for the plaintiff.

CROSBY, J. It is admitted that the defendants' testator was the owner of the tenement house in which the plaintiff received the injuries for which she seeks to recover. A part of the house was hired by the husband of the plaintiff from the defendants' testator on or about July 1, 1916, and was occupied by them at the time of the accident on November 26, 1916. An extension had been added to the front end of the house as originally constructed, in which, at the time of the accident, there were two shops, one occupied by a barber and the other by a furniture dealer. There was a room about eight by ten feet in size in the rear of the barber shop, occupied by that tenant, and a small hall opened upon the cellar stairs; there was another flight of stairs which led to the second floor. The plaintiff's husband hired three rooms on the second floor and two rooms in the attic. There was evidence that another tenant occupied other rooms in the house.

The undisputed evidence showed that there was but one water closet in the house and that it was located in the cellar. The plaintiff's husband testified that he was to have the same use of the cellar that the other tenants had; that he kept his coal and wood there; and that he and his family and the other tenants used the water closet. The plaintiff testified that she descended the cellar stairs to go to the water closet, and when a short distance from the foot of the stairs, a portion of the timbers supporting the floor of the small room connected with the barber shop fell upon her, causing the injuries for which she seeks to recover.

The defendants contended and offered evidence to show that the water closet in question was used only by the plaintiff's husband and his family; and that no other tenant had the right to use it. The jury were not bound to believe this testimony, but could have found that it was for the use of all the tenants in the building; and that the stairway leading to the cellar and the cellar itself remained in the control of the landlord, who permitted the

tenants to pass over the stairs and through the cellar as the only means of access to the only water closet on the premises. Upon such findings the landlord owed the plaintiff the duty of exercising reasonable care to keep the stairs and cellar in as safe a condition for the intended use as they were or appeared to be in at the beginning of the tenancy. The floor which fell upon the plaintiff was not a part of the premises leased to the plaintiff's husband.

There was ample evidence to show that the joists and timbers which supported the floor that fell were water soaked and decayed, and that this condition was caused by a leaky sink in the room occupied by the barber; that the beams that broke "looked wet and rotten." Upon this evidence it is manifest that the timbers and joists which fell could have been found to have been unsafe and dangerous, and not in as good condition as they appeared to be in when the tenancy of the plaintiff's husband began. There was evidence for the jury of the defendants' negligence. *Shea v. McEvoy*, 220 Mass. 239. *Fitzsimmons v. Hale*, 220 Mass. 461. *Oles v. Dubinsky*, 231 Mass. 447.

The plaintiff, as the wife of the tenant and a member of his family, may recover for the negligence of the landlord. *Domenicis v. Fleisher*, 195 Mass. 281, 283. It could not have been ruled that she was not in the exercise of due care. St. 1914, c. 553.

The testator's son, who had charge of the premises for about twelve years before the accident, was called as a witness by the plaintiff and was allowed to answer the following question: "After November 26, 1916, did you do any repairing to these beams or floors, or any timbers of the cellar?" This question was admitted as tending to show who was in control of the cellar, the defendants contending that it was not in their control; for that purpose it was competent, and the exception thereto must be overruled. Without referring in detail to the other exceptions taken to the admission and exclusion of evidence, we find no error.

The request that on all the evidence the plaintiff was not entitled to recover, could not properly have been given for the reasons stated.

Exceptions overruled.

JULIA B. DRISCOLL, administratrix, vs. BOSTON ELEVATED
RAILWAY COMPANY.

Suffolk. May 22, 1919. — June 23, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway, Causing death.

At the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, the evidence in its aspect most favorable to the plaintiff tended to show that on a clear evening in November the intestate started to cross a well lighted street in a city, not at a stopping place for cars nor at a cross walk, when an electric car of the defendant, properly lighted and proceeding at a rate of about ten miles an hour, was fifty to seventy-five feet away; that the motorman sounded his gong and caused the car to slacken its speed to four or five miles an hour; that the intestate paid no attention to the car and, without walking in front of it, came into collision with its forward corner, and that the car stopped within four or five feet of the point of collision. *Held*, that there was no evidence warranting a verdict for the plaintiff.

TORT for causing the death of John Walsh, the plaintiff's intestate, at twenty-five minutes after five o'clock in the afternoon of November 23, 1915, on Washington Street near Palmer Street in that part of Boston known as Roxbury, as described in the opinion. Writ dated February 26, 1916.

In the Superior Court, the action was tried before *White, J.* The evidence is described in the opinion. At the close of the evidence, upon a motion in writing by the defendant, the judge ordered a verdict for the defendant; and, the verdict having been returned, by agreement of the parties, reported the case to this court upon the following terms: If the judge was right in ordering the verdict, judgment was to be entered for the defendant upon the verdict; but if there was sufficient evidence to entitle the plaintiff to have the case submitted to the jury, then judgment was to be entered for the plaintiff in the sum of \$1,500, with interest and costs.

The case was submitted on briefs.

H. A. Kenny, for the plaintiff.

F. Ranney & T. Allen, Jr., for the defendant.

BY THE COURT. This is an action to recover damages for the death of John Walsh. The evidence in its aspect most favorable to the plaintiff tended to show that on a clear November evening the deceased started to cross a well lighted Boston street, not near a stopping place for cars or cross walk, when a trolley car of the defendant, properly lighted and then proceeding at about ten miles an hour, was fifty to seventy-five feet away. The motorman sounded his gong repeatedly and was seen to be "working his brake handle." "The car slowed down to about four or five miles an hour." The deceased paid no attention to the car and, without walking in front of it, came into collision with its forward corner. The car stopped within four or five feet. The testimony of the motorman was that he "shut off the power . . . and threw over the reverse lever, and put on a notch or two of power, at the same time putting on his brake . . . As soon as his reverse was set he eased his brake a little, to give the reverse a chance to work . . . when going forward you have first to overcome the forward motion of the wheels before they will revolve backward. He did all he could to stop the car, but did not have space enough."

It is manifest that as matter of law there was no evidence to warrant a verdict for the plaintiff. *Boyle v. Worcester Consolidated Street Railway*, 231 Mass. 184, *Anger v. Worcester Consolidated Street Railway*, 231 Mass. 163, and decisions collected in each opinion. *Pigeon v. Massachusetts Northeastern Street Railway*, 230 Mass. 392.

Judgment for the defendant on the verdict.

IRENE G. CONAHAN vs. A. COLEMAN FISHER.

LEMAN I. CONAHAN vs. SAME.

Suffolk. November 19, 22, 1918. — June 24, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Repairs, Landlord's liability to member of tenant's family. Evidence, Admissions, Competency. Custom.

If the second floor of a three-tenement house containing a separate tenement on each floor is let to a tenant, a railing of a platform and a corner post supporting the platform, forming a part of the tenement and within the horizontal planes bounding the second floor, are a part of the demised premises, which, unless otherwise provided by express agreement, the landlord is under no duty to keep in repair.

The mere fact that the supporting post, above described, constituted a part of the exterior construction and framework of the building essential for the other tenements as well as for the second floor tenement, does not bring it within the rule requiring the landlord to keep in repair portions of the building such as stairways and passageways, which are used in common by the occupants of the building and control of which is retained by the landlord.

The mere facts, that the landlord at the request of the tenant made repairs upon the demised premises, above described, from time to time, and that, about one month previous to an injury received by the wife of the tenant of the second floor and due to the giving way of the railing above described, a sagging condition of the platform had been called to the attention of the landlord, who had employed a carpenter to look the platform over but who had not made any repairs, does not constitute an admission of responsibility on the part of the landlord for the injury to the tenant's wife.

In an action against the landlord by the wife of the tenant of the second floor for the injury received as above described, it was said that, if it was assumed that the defendant had agreed to make outside repairs upon the building, the ordinary implication was that he was to do so only upon reasonable notice, and that there was no evidence of notice as to a defect in the railing, the breaking of which caused the injury.

At the trial of an action by a member of the family of a tenant of one floor of a three-tenement building against the landlord for personal injuries resulting from the breaking of a railing which was a part of the demised premises, where it appears that the tenancy was not under a lease in writing and that there was no express warranty by the landlord that the premises were reasonably fit for use nor any express agreement that he would keep them in a safe condition nor in the condition in which they were at the beginning of the tenancy, a custom is not admissible in evidence to the effect that, in the city where the accident occurred, in the letting of tenements without a lease in writing, when nothing

was said between the owner and the prospective tenant as to repairs, the owner should make necessary repairs and keep the property tenantable and in safe condition, such custom being invalid because contrary to the general rules of law.

Customs, which are in conflict either with express or with implied terms of a contract or undertake to avoid the effect of settled rules of law or to make for a definite class of cases or persons a law singular to such class, are invalid.

Collection and discussion by RUGG, C. J., of decisions relating to the effect upon contracts and commercial transactions of customs and usages.

TWO ACTIONS OF TORT, the first action being for personal injuries suffered in a fall caused by the giving way of a railing of a platform at the back of and a part of a tenement let by the defendant to the husband of the plaintiff; and the second action being by the husband for consequential damages. Writs dated June 30, 1916.

In the Superior Court the actions were tried together before *Chase, J.* The material evidence is described in the opinion. At the close of the evidence, the judge ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

The cases were argued at the bar for the plaintiffs in November, 1918, before *Rugg, C. J., Loring, Braley, Pierce, & Carroll, JJ.,* and afterwards, was submitted on briefs to all the Justices.

F. L. Norton, for the plaintiffs.

E. C. Stone, for the defendant.

RUGG, C. J. The plaintiffs, a woman and her husband, in these two actions of tort seek to recover from their landlord, the owner of the house, damages caused to them by the fall of a railing of a platform attached to and forming part of their tenement. There was evidence tending to show that the male plaintiff, several years before the events here in issue, orally hired at a monthly rental the tenement, which consisted of the second floor of a three-story wooden apartment house; that the tenement so hired consisted of a number of rooms within the main wall of the building, together with a balcony or platform for the exclusive use of the tenant outside the main wall of the building but adjacent to it and upheld by girders, which were supported in part by a corner post running from the bottom to the top of the building; that certain repairs were to be and were made by the defendant before the tenancy began, and thereafter all repairs requested by the plaintiffs were made, including painting and papering and

such like improvements; that about a month previous to the accident the male plaintiff observed that the floor of this platform was sagging and tending to fall away and become detached from the remainder of the building and notice was given to the agent of the defendant, who said that it should be fixed; that shortly thereafter the defendant employed a carpenter to look over the platform and see what was the matter with it, but that nothing had been done toward fixing it before the accident; that while the female plaintiff was leaning against the railing of the platform it gave way, causing injuries to her; that this was due to the rotten condition of the supporting post and of the railing.

A verdict rightly was ordered for the defendant on this evidence. The railing and the corner post, so far as within the horizontal planes bounding the second floor of the house, were a part of the demised premises. The wife doubtless had all the rights of a tenant. *Domenicis v. Fleisher*, 195 Mass. 281. But the platform was not under the control of the landlord. It was within the confines of the tenement. It formerly was not an uncommon event for the owner to convey one or more rooms out of a house. The dower of a widow often was set off by assigning to her the use of certain rooms in a homestead. There are numerous instances of such division of a dwelling being accomplished by will. Partition among tenants in common not infrequently resulted in the subdivision of the ownership of a house. In all these instances the ownership of the outside wall or supporting posts ordinarily was not retained out of a deed, partition, or devise, and merely cubic space bounded by the inner surface of walls, floors and ceilings made the subject of the transaction. A lease is merely a form of transfer of a right in real estate. It is difficult to think of a tenement apart from enclosing and supporting parts of the building. That conception does not ordinarily accompany the relation of landlord and tenant. Familiarity with it as a form of eminent domain is recent. *Old South Association v. Codman*, 211 Mass. 211. That such a platform is a part of the demised premises was decided in *Phelan v. Fitzpatrick*, 188 Mass. 237, which governs the present case on that point. See also *Nash v. Webber*, 204 Mass. 419, 425.

It has been argued ingeniously that, because the corner post of the building in part supporting the platform constituted a part

of the exterior construction and framework of the building essential for other tenements as well as for that of the male plaintiff, the landlord was bound to keep them in repair, on the same principle which holds the landlord responsible for the safe condition and continued repair of common stairways and passageways. *Andrews v. Williamson*, 193 Mass. 92. *Pizzano v. Shuman*, 229 Mass. 240, 243. That principle has no application to such facts as are here presented. The way in which the liability of the landlord for defects in common stairways and passageways has grown up and been developed shows that liability in a case like the present cannot be predicated upon that principle. The landlord retains control of common stairways and passageways. Hence for practical reasons he is held responsible for their safety, although, as pointed out in *Flanagan v. Welch*, 220 Mass. 186, 191, that liability is contrary to the principle commonly governing the relations of parties where one has an easement over property of another. From a structural standpoint a building is a unit, every essential part of which is needful for the strength and support of every other part. If the liability of the landlord touching repairs were made to rest on the proposition here urged, little would be left of the general principles of the law of the landlord and tenant as it has been developed and practised respecting oral leases. The law of landlord and tenant is founded on the conception that the demised premises pass into the control of the tenant. That is its basis. Such control is commonly exclusive. Lack of control by the landlord involves relief from obligation to repair. Said Mr. Justice Knowlton in *Szathmary v. Adams*, 166 Mass. 145, 146, "It is a familiar rule of law, that, in the absence of an express agreement to the contrary, the owner of a tenement let to a tenant is not bound to make repairs upon it during the term, and that the tenant alone is liable to third persons for damages caused by suffering the premises to become dangerous for want of proper repairs." This is the doctrine of the earlier and later cases through many years. It is firmly imbedded in the common law of this Commonwealth and generally elsewhere. It is only when it is a part of the agreement between the parties that the landlord shall maintain the tenement in repair and shall retain possession and control of the tenement for that purpose, and the right of the tenant is confined to a simple use of the tenement

without control for that purpose, that the landlord can be held liable in tort for failure to keep in repair. *Miles v. Janvrin*, 196 Mass. 431. Cases like *Hilden v. Naylor*, 223 Mass. 290, and *Priest v. Nichols*, 116 Mass. 401, where the landlord retained possession and control of the roof or other part of the building, are distinguishable from the case at bar and have no relevancy to the facts here disclosed.

The making of repairs by a landlord from time to time in response to the request of a tenant does not constitute an admission of responsibility on the part of the landlord. These are gratuitous acts which do not impose continuous liability. *McKeon v. Cutter*, 156 Mass. 296. *Kearnes v. Cullen*, 183 Mass. 298. *McLean v. Fiske Wharf & Warehouse Co.* 158 Mass. 472, 474. *Hannaford v. Kinne*, 199 Mass. 63. *Phelan v. Fitzpatrick*, 188 Mass. 237.

If it be assumed that the defendant had agreed to make outside repairs, the ordinary implication is that he was to make such repairs only upon reasonable notice. *Marley v. Wheelwright*, 172 Mass. 530. *Mills v. Swanton*, 222 Mass. 557, 559. There was no evidence of notice to the landlord of defect in the railing of the platform or the corner post. The sagging of the platform was a different matter.

The tenant offered testimony to show that there was a universal custom, in Boston where the accident occurred, in the letting of tenements without written lease, when nothing was said between the owner and the prospective tenant as to repairs, for the owner to make necessary repairs and keep the property tenantable and in a safe condition. It was excluded subject to the plaintiffs' exception.

Certain rules of law touching the respective rights and liabilities of landlord and tenant have become thoroughly fixed. No warranty is implied by the letting of premises that they are reasonably fit for use. The lessee takes an estate in the demised premises and he assumes the risk of their quality in the absence of an express warranty or deceit. *Tuttle v. Gilbert Manuf. Co.* 145 Mass. 169. There is no duty implied by the relation of lessor and lessee that the former shall keep the premises in a safe condition while in the possession of the latter, or in the same condition as they were in at the beginning of the tenancy. *Walsh v. Schmidt*, 206

Mass. 405. *Kearnes v. Cullen*, 183 Mass. 298. It was said in *Galvin v. Beals*, 187 Mass. 250, 252, with ample citation of authorities, that "The general rule in this Commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them." This rule has been reaffirmed in numerous cases subsequently decided. See, for example, *Mackey v. Loneragan*, 221 Mass. 296; *Lane v. Raynes*, 223 Mass. 514; *Rolfe v. Tufts*, 216 Mass. 563; *Miles v. Janvrin*, 200 Mass. 514; *Baum v. Ahlborn*, 210 Mass. 336. See also *Tredway v. Machin*, 91 L. T. (N. S.) 310.

These are the well settled incidents of the contract between the parties arising out of the relation of landlord and tenant. They are the terms of the contract implied from the existence of that relation. They also are the principles of law controlling the rights of lessor and lessee when not varied by the provisions of an express contract. They spring from the essential attributes of a lease, whether oral or written. These principles of law have been much discussed throughout our reports, because the contract implied from an oral lease of a tenement is so common and extends widely through the Commonwealth. The governing rules have become rules of property.

The practical effect of admitting testimony of such a custom would be to overrule by evidence all these and many other like decisions. It is not the province of custom or usage as recognized by the law to accomplish any such result.

A thorough discussion of the nature of custom or usage, the field of human relations which may be affected thereby, and the bounds to which it is subject, is found in *Dickinson v. Gay*, 7 Allen, 29, where previous decisions are reviewed, and the controlling principle on the subject is deduced and formulated. It there was held in effect that, although often a usage or custom has been sustained or rejected on the ground that it was or was not regarded as reasonable, the true principle is that a custom or usage "having reference to the methods of transacting business," is valid, but one which relates to the "mere adoption of a peculiar or local rule of law, contrary to the terms of the contract or to a general rule of law applicable to its construction," is invalid.

Respecting the alleged custom there in question of holding a merchant, selling goods by sample, where both sample and the bulk delivered contained a latent defect, nevertheless responsible as upon a warranty against defect, it was said, page 37: "the usage proved does not relate to any particular course of dealing, but is the adoption of a mere doctrine as to the rights and obligations of the parties under a contract of sale, which doctrine is contrary to the rule of the common law on the subject. It holds that a warranty is implied, when by law it is not implied. . . . There is no necessity for such usages; because if the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale; or if the manufacturer sells without warranty, he can so express it. But if such usages were to prevail they would be productive of misunderstanding, litigation and frequent injustice, and would be deeply injurious to the interests of trade and commerce. They would make it necessary to prove the law of the case by witnesses on the stand, and it would be settled by the jury in each particular case. Public policy, therefore, requires that when parties assume obligations which the law does not impose, or release obligations which it does impose, it should be done by express contract. For this reason, the remark of Mr. Justice Story, in 2 Sumner, 569, that of late years the courts of law both in England and America have been disposed to narrow the limits of the operation of such usages, and not to extend them, has been quoted with approbation both in England and in the courts of our sister States." That statement of law is precisely applicable to the custom here sought to be shown. This decision has often been cited with approval. Subsequent cases have applied its principle but have not narrowed or enlarged its scope. For example, it was said by Chief Justice Gray in *Taber v. China Mutual Ins. Co.* 131 Mass. 239, 252: "Evidence of usage . . . is never admissible to control the rules of law as to the mode in which a loss [under an insurance policy] shall be computed;" and by Mr. Justice Wells in *Haskins v. Warren*, 115 Mass. 514, at pages 535, 536: a "usage . . . may therefore be resorted to for aid in supplying the unexpressed terms of . . . agreements. . . . In this way it may modify the application of general rules of law. But it cannot be allowed . . . to engraft on a contract . . . a stipulation or obligation different from or inconsistent with the

rule of the common law on the same subject;" and by Chief Justice Bigelow in *Reed v. Richardson*, 98 Mass. 216, at page 218: "Any usage, in order to be operative . . . must also be of such a nature that it does not in any degree tend to controvert the well established rules of law." The subject of custom also was considered with care in *Barnard v. Kellogg*, 10 Wall. 383, where it was said, at pages 390, 391: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this. . . . And it is well settled that usage cannot be allowed to subvert the settled rules of law." In the application of this principle it there was held that a custom overthrowing the rule of *caveat emptor* in a purchase of wool was bad. *Dickinson v. Gay*, 7 Allen, 29, and *Dodd v. Farlow*, 11 Allen, 426, both were quoted with approval. See, also, *Allen v. St. Louis Bank*, 120 U. S. 20, 39. In *Thompson v. Riggs*, 5 Wall. 663, 679, 680, it was said: "Judge Story expressed himself strongly against local usages or customs . . . set up to controvert or annul the general liabilities of parties under the common law as well as under the commercial law. . . . Usage contrary to law . . . is never admitted to control the general rules of law." *Bliss v. Ropes*, 9 Allen, 339, 343. *Dodd v. Farlow*, 11 Allen, 426, 429. *Snelling v. Hall*, 107 Mass. 134, 139. *Fletcher v. Dickinson*, 7 Allen, 23, 25. *Warren v. Franklin Ins. Co.* 104 Mass. 518, 521. *Hedden v. Roberts*, 134 Mass. 38. *Emery v. Boston Marine Ins. Co.* 138 Mass. 398, 409. *Little v. Phipps*, 208 Mass. 331, 334. *Savings Bank v. Ward*, 100 U. S. 195, 206, 207. Indeed, it has been held that parties cannot, even by express contract, establish a law for themselves contrary to the general law of the jurisdiction. *Nashua River Paper Co. v. Hammermill Paper Co.* 223 Mass. 8. Custom has been defined as "that length of usage which has become law. It is a usage which has acquired the force of law. . . . A general custom is the common law itself, or a part of it." *Walls v. Bailey*, 49 N. Y. 464, 471. *Strother v. Lucas*, 12 Pet. 410, 445, 446. *Albright v. Cortright*, 35 Vroom, 330. *Russell v. Ferguson*, 77 Vt. 433, 435. *Milroy v. Chicago, Milwaukee & St. Paul Railway*, 98 Iowa, 188, 194.

The law itself has, however, fixed with precision the respective

rights and obligations of landlord and tenant under an oral lease as to repairs upon the demised premises in the absence of definite contract. It is beyond the province of custom to vary this rule. It can be done only by express contract. Two diametrically opposed principles of law cannot govern the same facts at the same moment.

General commercial customs or particular usages of trade, when not contrary to the express terms or necessary implications of the contract, or a special meaning attaching under the dialect of a particular business, occupation or profession to the use of a word or phrase, and not invoking the application of law contrary to the established principles of the common or statutory law, are valid. *Proctor v. Atlantic Fish Companies*, 208 Mass. 351, 355. The numerous cases collected in the brief for the plaintiff, where a custom has been held admissible and valid, all come within this classification. But customs which are in conflict, either with the express or implied terms of the contract, or undertake to avoid the effect of settled rules of law, or to make for a definite class of cases or persons a law singular unto such class, are bad.

Within the inhibition of this classification falls the custom sought to be shown in the case at bar. So far as there is anything stated in the opinion in *Shute v. Bills*, 191 Mass. 433, 436, at variance with this conclusion, it is unsupported by authority and cannot be followed. The issue in that case related to the undertaking by the landlord to make repairs and the negligent performance of that undertaking. That is stated on page 437. It was on that footing that the judgment rested. Indeed in that decision, respecting an offer to show an established custom in Boston to the effect that the landlord retains control of the yard and the outside of houses including the roof and gutters, it is said on page 438: "the evidence was plainly inadmissible. It contradicts both the agreement of the parties and the rule of the law. Such a custom would be a bad one."

As matter of the strict authority of decisions, the case at bar on this point is governed by *Sawtelle v. Drew*, 122 Mass. 228, where it was held that a custom to engraft upon an agreement to hire a house, a custom that a lessor was required to clean a house before the lessee entered into possession of it, was bad. See, also, *Richardson v. Copeland*, 6 Gray, 536.

Upon another ground the custom was incompetent. It is provided by R. L. c. 127, § 3, that an oral lease creates only a tenancy at will, and in the absence of express agreement confers the rights and imposes the obligations on landlord and tenant which are universally incident to that relation throughout the Commonwealth. It follows that the tenancy at will of the statute cannot be governed by local or customary law, but has and must have the same legal operation in every city and town.

Exceptions overruled.

ANNIE CRONIN vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 15, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Judge's charge, Exceptions.

General exceptions to specific portions of a charge to a jury, where there were no requests for rulings on the subject matter of the exceptions, will not be sustained unless substantial error or injustice plainly appears.

At the trial of an action against an elevated railway company for personal injuries caused by a fall due to an alleged defect in the stairway of a station of the defendant, the evidence, both as to the existence of the defect and as to the extent of the injury, was conflicting. In his charge to the jury, the judge, in speaking of the evidence on the question of liability, used the expression, "see if there is anybody . . . of whom you can say, 'I am convinced by that person';" and, discussing the testimony of the experts on the question of injury, the judge stated, "You may pick out one or two of those men that you say you will stand by." The tenor and purport of the entire charge were that the jury were to decide the case according to all the evidence, remembering that the burden of proof was upon the plaintiff to satisfy them on all the features of the case. The defendant alleged an exception "to so much of the charge as said that the jury should try to pick out one witness, because it seems to neglect the question of weight of the evidence." *Held*, that, although, taken by themselves, the expressions of the judge above quoted were objectionable, no substantial error appeared when the charge was considered as a whole.

TORT for personal injuries caused by a fall on a stairway of the defendant's station at Beach Street in Boston. Writ dated November 14, 1916.

In the Superior Court the case was tried before *Hall, J.* The

material evidence is described in the opinion. The defendant made no requests for rulings. The last two paragraphs of the charge of the judge were as follows:

"When you gentlemen go out into the jury room, start this case and work it out, not on the lines of my charge especially — I am only giving you the law with perhaps some suggestions that I hope are practical — but start with that open-mindedness that both these lawyers and their clients are entitled to, and see if you can figure this thing out, based on the proposition I have given you and where you say the burden of proof is. So long as the burden is sustained by the plaintiff, even to the end, she is entitled to have you follow. Wherever that burden falls, there you have got to stop. You will go out in your jury room and you will talk this over and look at it, and try to get it right, under your oath, for both these people, both the company and Mrs. Cronin, to the end that you may do justice. Decide it on the evidence. Don't decide it upon collaterals — that you know somebody else that got hit on the head and had a cancer. That is not evidence. It is the purest hearsay from one man in the jury room to his brothers; it doesn't amount to anything. You have got a right to take the experience you have acquired in this world with respect to disease, however. You have a right to use that in forming your judgment. As I told you before, you have a right to say what are the probable uses of the elevated railroad. That is why you are here, because they are appealing to your judgment. They want your judgment on the evidence, though. This is an important case for both these parties. It has been well tried, I think I may perhaps say fairly tried, and all the counsel can ask on behalf of their clients is that you give them an honest decision of this case, based on the law and the evidence, wherever it leads you.

"As you make up your mind, you will honestly, as under your oath of office you must, as a proposition that conclusively follows, return a verdict for the party that you say is entitled to it."

Other material portions of the charge are described in the opinion.

The jury found for the plaintiff in the sum of \$5,000; and the defendant alleged exceptions "to so much of the charge as said that the jury should try to pick out one witness, because it seems to neglect the question of weight of the evidence. 'I would single out one.' That is both on the question of liability and damages."

The case was submitted on briefs at the sitting of the court in January, 1919, and afterwards was submitted on briefs to all the Justices.

F. Ranney & T. Allen, Jr., for the defendant.

H. A. Wilson, F. Juggins & T. F. Murphy, for the plaintiff.

CARROLL, J. The plaintiff was a passenger on one of the defendant's cars and when descending the exit stairway of its station at Beach Street, on July 30, 1916, fell and was injured. The plaintiff testified that the cause of her fall was a loose screw which projected from the tread of the top step and that the metal tread of this step was loose. She was cut and bruised as the result of the fall, and contended she was so bruised that a cancer developed on her right breast, which was later removed by an operation.

It was not questioned that the plaintiff was a passenger and by her fall was slightly injured. The defendant produced several witnesses who testified that they examined the steps upon which the plaintiff said she had fallen and could find no loose screw or tread or other defect in them. The experts called by the plaintiff testified that the injury to the breast, caused by the fall, was sufficient cause of the cancer, one of these witnesses saying "that the possibility of recurrence was relatively high." Doctors Whitney and Fairbanks, for the defendant, testified that the blow and injury to the right breast would not be an adequate cause for a cancer. Dr. Fairbanks further stated that when he examined the plaintiff in the presence of her physician, Dr. Granger, in February, 1917, nothing was said by either the plaintiff or her physician about a bruise on the breast. There was a verdict for the plaintiff.

The defendant excepted "to so much of the charge as said that the jury should try to pick out one witness, because it seems to neglect the question of weight of the evidence, 'I would single out one.' That is both on the question of liability and damages."

In *Taft v. Seabury*, 11 Pick. 140, where the defence was that the goods sold and delivered were sold on credit, the defendant produced a witness, Chamberlain, who so testified, which testimony was denied by the plaintiff; the judge instructed the jury, if they believed Chamberlain they ought to find for the defendant,

unless from the other evidence and circumstances they should find that the offer of credit was withdrawn and other terms of sale substituted. This instruction was considered erroneous because the proper instruction would have been, "that they should find for the defendant if, upon the whole evidence, they believed that a credit had been given." See, in this connection, *Gray v. Boston Elevated Railway*, 215 Mass. 143, 148.

In that part of the charge where the judge was considering the question of damages, referring to the medical experts in the case he said to the jury: "You may pick out one or two of those men that you say you will stand by;" and, when discussing the issue of liability, after directing attention to the statements of the various witnesses called by the defendant on this question, he said: "see if there is anybody . . . of whom you can say, 'I am convinced by that person'?" These instructions would have been objectionable, if they directed the jury to select one or two witnesses and decide the case on their testimony alone, without weighing and considering all the evidence in the case.

To determine the question the entire charge must be considered and if, taken as a whole, the instructions were not erroneous, a single sentence or paragraph cannot be separated from the text as ground for reversible error. General exceptions to specific portions of the charge, where no requests are asked for, will not be sustained unless substantial error or injustice plainly appears. *Commonwealth v. Meserve*, 154 Mass. 64. *Dewey v. Boston Elevated Railway*, 217 Mass. 599, 604. *Connors Brothers Co. v. Sullivan*, 220 Mass. 600, 607. *Adams v. Nantucket*, 11 Allen, 203. Taking the charge as a whole, the jury were clearly told many times that the plaintiff must prove her case by a fair preponderance of evidence, that the burden of proof was upon her to demonstrate her case to their satisfaction. There was no substantial error in the charge. It does not appear that any injustice was done the defendant and we do not think the jury were misled.

As we have said, it was denied by the defendant that the stairway was defective and several witnesses were called by the defendant to prove that there was no loose tread or screw. The judge, in calling the jury's attention to what appeared to be a disagreement in the testimony of some of the defendant's witnesses, referred to one witness who claimed the tread was bolted

down by screws to the bed plate, and asked the jury to decide who was right about that, "because the plaintiff has got to have a situation here that would demonstrate to your satisfaction that a condition of looseness existed upon that tread and that there was a projecting screw." Following this he said, "It is pretty important for you to find out whether or not it was bolted down to the bed-plate at the top of the floor, as Frederick says it was," or "it hung over some," as claimed by the defendant's roadmaster.

After referring to other witnesses, called by the defendant, the judge said: "Now is there anybody there that you say among all those witnesses . . . inspected those stairs . . . to see the situation exactly as it was? If you do, you have got a very important witness in this case." Then, referring to the question whether there was a projecting screw and a loose tread, he said: "It is not a question of imagination on either side. You have got to meet it just exactly where it lies. . . . You have got to test out the persons upon the one side and upon the other, and sift them down if you can, see if there is anybody, one or more, that is reliable, of whom you can say, 'I am convinced by that person.'" In this part of the charge relating to the defect, the jury were fully instructed to weigh all the evidence and to test all the witnesses.

The remark concerning the testimony of the witness and being convinced by some one person, cannot be disconnected from the context, and relied on as showing that the jury were misled or directed to decide upon the testimony of one person alone. In this part of the charge the jury's attention was at the time directed to the defendant's side of the case. They were then considering the defendant's witnesses and they could not have understood by this single sentence, in view of all that was said to them, that they were to eliminate all the other evidence in the case.

On the question of damage there was no dispute that the plaintiff had a cancer, but it was disputed that it was caused by the fall. Here again the judge said, "It is for the plaintiff to show you by a fair preponderance of the evidence that the cancer she had was the result of that blow." In charging the jury on this aspect of the case, after referring to the experts called by the plaintiff and the defendant he said, "You may pick out one or two of those men

that you say you will stand by." Then in considering the question of recurrence of the cancer he told the jury: "The burden of proof is on the plaintiff to prove that to you. . . . Satisfy yourself in this case, as abstractly as you can look at it, that what she alleges she has proved. If you are satisfied, if your minds are convinced that the probabilities are based on the medical experience and history, that she is ultimately going to have another cancer, with its results, she is entitled to damages for that." And as he neared the close of the charge the judge said: "So long as the burden is sustained by the plaintiff, even to the end, she is entitled to have you follow. Wherever that burden falls, there you have got to stop."

We have referred to the charge at some length, but even on the question of the plaintiff's damages, although there was one sentence authorizing the jury to pick out one or two men to stand by, the whole tenor and purport of the charge was to decide the case according to all the evidence, remembering that the burden of proof was upon the plaintiff to satisfy them on all the features of the case. From the beginning of the charge to the end it was frequently stated that having heard all the evidence the jury must be satisfied by a fair preponderance of it that the plaintiff's case was established. They could not have understood from the sentence referring to the selection of one or two witnesses that they were to decide upon the question of the plaintiff's damages without reference to all the other facts and testimony bearing on this issue.

Construing the instructions in their entirety, we think the jury were properly directed and there was no reversible error.

Exceptions overruled.

CHARLES H. EMERSON vs. JACOB E. ACKERMAN & another.

Suffolk. January 22, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Contract, Construction, Performance and breach. Agency. Waiver.

At the trial of an action of contract for commissions alleged to be due to the plaintiff for procuring sales of sole leather by the defendant to a certain firm, it appeared that, while the rate of commission was agreed upon, there was no express agreement as to a definite time during which the plaintiff should receive a commission for such sales and there was no evidence from which such an agreement could be implied. *Held*, that the defendant could terminate the contract upon reasonable notice to the plaintiff.

At the trial above described, there was evidence that the defendant wrote a letter to the plaintiff on April 13 of a certain year stating that thereafter he would pay the plaintiff no commission on sales to the firm in question; that shortly thereafter the plaintiff talked on the subject with the defendant and told him that he would expect his commission, and the defendant said, "You will get it and anything that is coming to you;" that the next month he received a letter from the defendant enclosing a check for commissions through the month of April; that, at the end of January of the following year, he received a further payment of commissions from the defendant; that he had received nothing between that time and the time of the bringing of the action, two years and two months later, and, when he spoke to the defendant about it, the defendant said that he "would get anything that was coming to him." *Held*, that, whether the defendant had waived his right to terminate the contract depended upon what was the intent of the parties and was a question of fact for the jury, who were warranted in finding that there had been such a waiver.

CONTRACT for commissions for procuring certain sales of sole leather by the defendants to a firm known as "Dunn and McCarthy." Writ dated March 25, 1916.

In the Superior Court, the action was tried before *Lawton, J.* The material evidence is described in the opinion.

At the close of the evidence the defendants asked for the following rulings:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. If the contract was so far incomplete that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is at liberty to terminate it at will on giving reasonable notice of his intention so to do.

"3. The parties having left out of the contract the question of its duration the defendants cannot therefore be held to have entered into a contract to extend for all time.

"4. If you find that the contract between the parties was oral and that the respondents agreed to pay ten cents per case on goods sold to Dunn and McCarthy in consideration of the personal services of the complainant in helping to increase the sales by the defendant to Dunn and McCarthy, and no time as to its termination was referred to between the parties, either express or implied, then either party had the right after a reasonable time to terminate the contract upon giving reasonable notice.

"5. If there was an oral contract between the parties in which the plaintiff was to render his personal services to aid the defendants in selling goods to Dunn and McCarthy, and no time was set for the termination of the contract, either party upon reasonable notice could terminate the contract.

"6. If you find that the contract between the parties was an oral one and the defendants for a time were to pay ten cents per case on goods sold to a customer in consideration of the plaintiff rendering some service, the defendants had the right to terminate the contract after a reasonable time by giving reasonable notice.

"7. If you find that the arrangement between the parties was not to continue for any particular time, its continuance would be only during the pleasure of the parties and could be terminated at any time upon reasonable notice.

"8. If you find that there was no time fixed by the parties, express or implied, during which the contract was to continue, it was terminable upon reasonable notice.

"9. If you find that the contract between the plaintiff and the defendants was to pay ten cents a case on sales to Dunn and McCarthy for a while or for a time not stated, the defendants had a right to terminate the contract after a reasonable time upon giving reasonable notice."

These rulings all were refused, except the ninth, which was given with the words "or for a time not stated" stricken out. The jury found for the plaintiff in the sum of \$2,601. The defendants alleged exceptions, it being agreed that, if the plaintiff was entitled to recover, he should recover \$2,601.

The case was submitted on briefs.

J. E. McConnell, for the defendants.

B. J. Killion & C. Toye, for the plaintiff.

CROSBY, J. This is an action of contract to recover a commission of ten cents a case on all cases of sole leather sold by the defendants to a concern known as Dunn and McCarthy.

The plaintiff and the defendants made an oral agreement, and the bill of exceptions recites that "The only material dispute between the parties is that relating to the time for which the agreement would run, and by virtue of the agreement the defendants paid the plaintiff ten cents per case on cases sold to Dunn and McCarthy for a period of time when the defendants on April 13, 1913, notified the plaintiff that they would no longer continue to pay the commission, and paid the plaintiff on January 27, 1914, the commission on all orders prior to April 13, 1913."

There was evidence that Dunn and McCarthy were former customers of the defendants who, before the contract between these parties was entered into, had ceased buying goods of the defendants.

The plaintiff testified that in August, 1911, one Buckley, a salesman in the employ of the defendants, came to his office and told him that he represented the defendants who had been unable to sell Dunn and McCarthy, and that "they would be glad to get them back . . . and wanted to know what the plaintiff could do about it; that he told Buckley he was selling them a lot of goods and might be able to do something for him and asked what the commission was, and Buckley said, 'The regular commission is ten cents a case,' and the witness replied that it was not much and Buckley then said he would take it up with the firm;" that afterwards Buckley came back and said his firm would give the plaintiff ten cents a case on all soles ordered by Dunn and McCarthy; that afterwards the plaintiff saw the defendant Ackerman, who said that he was very glad to get them (Dunn and McCarthy) as customers, that "They are great people, just what we want;" that the plaintiff replied, "It doesn't amount to much," and Ackerman said, "It will. It will be a good thing for you."

The plaintiff further testified that after the interviews with Buckley and Ackerman above referred to he went with Buckley to the factories of Dunn and McCarthy at Auburn and Binghamton, New York, and introduced Buckley; that thereafter

orders for goods were given by Dunn and McCarthy, some of which came through the plaintiff and were forwarded by him to the defendants; that he received a letter from the defendants, dated April 13, 1913, in which it was stated that thereafter they would not pay any more commissions on sales made to Dunn and McCarthy; that soon after the receipt of this letter, he talked with the defendant Ackerman and told him he would expect his commission and that Ackerman replied, "You will get it and anything that is coming to you;" that he received another letter from the defendants, dated May 2, 1913, in which it was stated that a check was enclosed for commissions due to April 30, 1913; that on January 27, 1914, he was paid by the defendants \$159.60; that the defendants continued to receive orders from Dunn and McCarthy but they have paid him no commission since; that from February, 1912, until January 27, 1914, he received from the defendants between \$1,500 and \$1,600; that subsequently when he asked the defendants about the commission, "Mr. Ackerman said that he (plaintiff) would get anything that was coming to him." The plaintiff further testified that the services rendered by him to the defendants "continued for a period of a couple of years."

The defendant Ackerman testified that at an interview with the plaintiff, in the presence of his partner, Brummel, and Buckley, he (Ackerman) stated with reference to paying the plaintiff a commission on sales made to Dunn and McCarthy, "'We will try it for a while; see how it works' and parties agreed on a commission of ten cents per case."

We agree with the defendants that the term of the contract is to be determined as a question of fact upon all the evidence including the words used, the course of dealing, and other acts of the parties. *Maynard v. Royal Worcester Corset Co.* 200 Mass. 1.

Upon the evidence it appears that there was no express agreement that the plaintiff was to receive a commission on sales by the defendants to Dunn and McCarthy for any definite time, and there is no evidence from which such an agreement can be implied. Under such circumstances the defendants could terminate the contract upon reasonable notice to the plaintiff. The letter of April 13, 1913, would have been sufficient to terminate the contract in the absence of any evidence to show that the

notice therein given had been waived. *Harper v. Hassard*, 113 Mass. 187. *Marble v. Standard Oil Co.* 169 Mass. 553. *Bradlee v. Southern Coast Lumber Co.* 193 Mass. 378. *Tubbs v. Cummings Co.* 200 Mass. 555.

We are of opinion that the jury could have found, upon the evidence above referred to and the other evidence recited in the record, that the defendants had waived the notice given to terminate the contract, and thereafter impliedly agreed to continue to pay the plaintiff a commission on sales to Dunn and McCarthy in accordance with the original understanding. *Jaques & Son v. Parker Brothers*, 188 Mass. 94. *Natural Coal Tar Co. v. Malden & Melrose Gas Light Co.* 189 Mass. 234. *McNeil v. American Bridge Co.* 196 Mass. 56. Whether the defendants waived their right to terminate the contract depended upon the intent of the parties, to be ascertained from the evidence which was conflicting; it was a question of fact for the jury. *West v. Platt*, 120 Mass. 421.

No exception was taken to the charge, portions of which, relating to the original contract only, are recited in the record. The charge in this respect was adequate and sufficient to present to the jury with accuracy the respective contentions of the parties on this branch of the case.

The only exceptions relate to the refusal of the court to give nine rulings. The first, that upon all the evidence the plaintiff is not entitled to recover, could not properly have been given for the reasons stated. The ninth, as modified by the presiding judge, was given in these words: "If you find that the contract between the plaintiff and the defendants was to pay ten cents a case on sales to Dunn and McCarthy for a while, the defendants had a right to terminate the contract after a reasonable time upon giving reasonable notice." This instruction was a correct statement of the law, and was plainly applicable to the evidence before the jury respecting the terms of the original contract. In substance it covered all the other requests, except the first, and fully protected the rights of the defendants.

The charge upon other issues involved in the case, including that relating to waiver and not reported, we are bound to assume was accurate and sufficient.

The exceptions must be overruled; and, in accordance with

the agreement recited in the record, judgment is to be entered for the plaintiff in the sum of \$2,601, with interest from the date of the writ.

So ordered.

ALLAN J. MCNEIL vs. MIDDLESEX AND BOSTON STREET
RAILWAY COMPANY.

Middlesex. March 5, 1919. — June 24, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway. *Practice*, *Civil*, Requests and rulings, Appeal, Exceptions, Interrogatories. *Evidence*, In rebuttal.

Where, at the trial of an action of tort against a street railway company for damages to the plaintiff's property alleged to have resulted from a collision of a team of the plaintiff with a street car of the defendant, the evidence on the question of liability is conflicting, a ruling, that on all the evidence the plaintiff was entitled to recover, must be denied.

At such a trial the judge need not give a ruling, that "there is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way . . . must look and listen for an approaching car before entering upon the tracks of the electric railway," even if it is a correct statement of the law, especially where it appears that the driver of the plaintiff's team testified that he did look for a car before crossing the defendant's tracks and did not see one until it was six feet from him.

A request for a ruling, which assumes as true a fact as to which the evidence is conflicting, need not be given.

Where, at the trial above described, the plaintiff was permitted to testify as to the value of his property before and after the accident, he is not harmed by not being permitted to ask his driver how much the horse depreciated in value because of the accident nor by not being permitted himself to testify how much a new horse cost.

Where, in direct examination of the plaintiff's driver at the trial above described, he had testified that the street car struck his left rear wheel, an exception to a refusal to permit the same witness to be asked in rebuttal whether the street car struck the front of the wagon must be overruled, the subject matter of the question being a part of the plaintiff's case in chief and its exclusion in rebuttal being a matter of discretion.

Whether an appeal will lie from orders denying a motion that a defendant disclose the names and addresses of his witnesses and a motion to amend the record so that it would show that a motion for further answers to interrogatories was denied, was not determined; but it was stated that exceptions were recognized as a preferable way of presenting such questions.

The granting of a motion, that a defendant in an action of tort against a street railway company for damages to the plaintiff's property caused by a collision of a horse and wagon with a street car of the defendant, disclose to the plaintiff the names and addresses of its witnesses, is, by St. 1913, c. 815, § 3, a matter of discretion, and an exception to a denial of the motion must be overruled.

An exception to the denial of a motion to amend a record, where the evidence as to the correctness of the record is conflicting, must be overruled.

TORT for injury to the plaintiff's horse and milk wagon and the contents of the wagon, alleged to have been caused by a collision with a street car of the defendant resulting from negligence of the motorman of the car. Writ dated September 8, 1913.

Action as to certain motions of the plaintiff relating to interrogatories of the plaintiff and answers thereto, from which the plaintiff appealed, is described in the opinion.

The case was tried before *Keating, J.* The material evidence is described in the opinion. At the close of the evidence, the plaintiff asked for and the judge refused the following rulings:

"1. Upon all the evidence in the case the plaintiff is entitled to recover.

"2. Ordinarily the questions of due care of the plaintiff and negligence of the defendant are issues of fact for the jury.

"3. There is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way, but are run in common with other vehicles and with travellers, must look and listen for an approaching car before entering upon the tracks of the electric railway.

"4. If the jury find that the defendant's car struck the plaintiff's team at the foot of a hill, while the car was going at an excessive rate of speed and was crossing the junction of Bowen Street and Gibbs Street, and while the driver of the team was driving in the public street across said railway track from Bowen Street to Gibbs Street, they will be warranted in finding that the defendant was negligent.

"5. If the jury find that the accident was caused by the negligence of the defendant while the plaintiff was in the exercise of due care and that the plaintiff's horse, wagon and contents were damaged as a direct result of the accident, the plaintiff is entitled

to recover therefor the difference between the value of each immediately prior to the accident and the value of each after the accident as affected by the accident."

The jury found for the defendant; and the plaintiff alleged exceptions.

A motion to amend the record, filed after the verdict, described in the opinion, was heard by *Hall, J.*, and was denied. From the order denying the motion the plaintiff appealed, and also alleged an exception.

H. B. Mackintosh, for the plaintiff.

P. F. Drew, for the defendant.

CARROLL, J. The plaintiff sues to recover for injury to his horse, milk wagon and contents, caused by a collision with one of the defendant's cars. The evidence was conflicting. The plaintiff contended that, while driving at the rate of four miles an hour from an intersecting street across the defendant's tracks, one of its cars moving at a rapid rate of speed and without any signal of its approach ran into his team. The defendant contended that the plaintiff's horse was going at a high rate of speed, and that the car had stopped when the plaintiff's wagon was driven over the fender. The jury found for the defendant.

The case properly was submitted to the jury. The plaintiff's first request could not have been given rightly; the questions raised by the second request were left to the jury. The judge instructed the jury regarding the duties of the plaintiff and of the defendant. No exception was taken to his charge.

He was not required to give the plaintiff's third request, even if it be assumed to be a correct statement of law. In addition to this, the driver of the team testified that before crossing the track he looked in the direction from which the car was coming and did not see any car; that he first saw the car when it was about six feet from him. With this evidence in the case the request was not appropriate. *Howes v. Grush*, 131 Mass. 207, 211. *Coles v. Boston & Maine Railroad*, 223 Mass. 408, 416. *Hooper v. Cuneo*, 227 Mass. 37, 40, and cases cited.

The fourth request was based on the speed of the car. The judge could not adopt the plaintiff's language emphasizing the fact that the car was going at a high rate of speed. That fact was disputed; and as the jury were fully instructed on the point

there was no error in refusing the request. *Altavilla v. Old Colony Street Railway*, 222 Mass. 322.

The fifth request relates to the question of damages. The jury were carefully instructed on this question.

There was no reversible error in excluding the question asked the plaintiff's driver, as to how much the horse had depreciated in value by reason of the accident; or the question asked the plaintiff, — "How much did the new horse cost?" The plaintiff was not harmed thereby: he was permitted to testify how much his property was worth before and after the accident.

In direct examination the driver of the team testified that the car struck the left rear wheel of the plaintiff's wagon. In rebuttal he was asked if the car struck the front of the wagon. This evidence was excluded, and the plaintiff excepted. There was no error in excluding the evidence offered in rebuttal. It was a part of the plaintiff's case in chief, and it was within the discretion of the trial judge to exclude it when offered in rebuttal. *Jewett v. Boston Elevated Railway*, 219 Mass. 528, 532. In addition to this, the plaintiff testified in rebuttal that "He could n't see a scar on the front wheel and that there was no evidence that it was struck." See *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 194 Mass. 412.

The plaintiff filed interrogatories to be answered by the defendant; and moved that the defendant be ordered to "expunge, amend, and answer" certain interrogatories, and to disclose the names of the defendant's witnesses and their addresses. It appeared that Interrogatories 4, 5, 10, 11 and 21 were ordered to be further answered "by consent and order," and that the motion to disclose the names and addresses of witnesses was denied. It is not shown that there was any further order of the court in reference to Interrogatories 17, 19 and 24. The plaintiff appealed from so much of the order as refused the motion seeking to have the defendant further answer Interrogatories 17, 19 and 24, and to disclose the names and addresses of witnesses. If it be assumed in favor of the plaintiff that questions of this sort can be raised by appeal and not alone by exceptions, which in any event is the preferable and well recognized way of presenting such questions, *Brooks v. Shaw*, 197 Mass. 376, no error is shown. An appeal in an action at law brings before the court only errors

of law apparent on the record. *Moran v. Murphy*, 230 Mass. 5. There is no error of law apparent on this record. It is not shown that any order was entered directing the defendant or refusing to direct the defendant to answer further the three interrogatories referred to, and the request for the names and addresses of witnesses was a matter largely within the discretion of the trial court. It is only when "justice seems to require it" that a party is to disclose the names and addresses of his witnesses. See, in this connection, St. 1913, c. 815, § 3. *Looney v. Saltonstall*, 212 Mass. 69, 72. *Nickerson v. Glines*, 220 Mass. 333.

After the case was tried and a verdict was returned, the plaintiff moved to amend the record so as to read, that the court refused to order "expunged, amended, and further answered Interrogatories 17, 19 and 24" the court having denied the motion, from which order denying the motion the plaintiff appealed. He also filed a bill of exceptions. Here again assuming, but without deciding, that the plaintiff can raise the question by appeal, no error of law is shown. *Moran v. Murphy, supra*.

The exceptions must be overruled. The assistant clerk testified that, if the court had refused to order the interrogatories to be further answered, this order would have appeared on the record. The judge was not bound to believe the evidence offered by the plaintiff.

Exceptions overruled.

Appeal dismissed.

NEW YORK CENTRAL RAILROAD COMPANY & another vs. DAVID STONEMAN & another.

Suffolk. March 7, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant, Construction of lease. *Contract*, Construction. *Evidence*, Extrinsic affecting writings, Of conduct of parties to contract.

A provision of a lease of several floors of a building in Boston to a railroad company to be occupied by the lessee as a freight office for a freight terminal, was "that the demised premises shall be heated by the lessors to a proper

warmth for office purposes." *Held*, that this provision related only to the degree of heat to be furnished and not to the part of the day or week during which the building was to be heated.

There was no provision in the lease, above described, as to the part of the day or week during which the demised premises should be kept heated, and it was *held*, that in that respect the lease was ambiguous, so that extrinsic evidence was admissible to show what was the intention of the parties upon that question.

If the true import and meaning of an instrument in writing cannot be determined from its language, it will be construed most strongly against the party using the uncertain language.

It appeared that the lease above described demised to the lessee the second and third and a part of the first floor and basement of a seven-story building, and that the rest of the building was occupied by stores and manufacturing establishments; that there was a custom in Boston of heating office buildings from eight o'clock in the morning to six o'clock in the evening and manufacturing establishments from seven o'clock in the morning to six o'clock in the evening unless the lease called for heat beyond those hours; that the lessor knew before the lease was executed that the lessee would use the premises as a railroad office at its freight terminal; that it was necessary for the proper operation of the railroad for the lessee to use freight trains on holidays, Sundays and at night and that for the handling of freight it also was necessary to keep a force of clerks at the freight offices day and night and on holidays and Sundays. In a suit in equity to compel the furnishing of heat to the lessee on nights and holidays and Sundays, it was *held*, that it could not be ruled as a matter of law that the lessee was not entitled to have the premises heated twenty-four hours of every day.

The suit above described was against a mortgagee of the demised premises, who had agreed to be bound by its provisions, if he foreclosed his mortgage, and who had so foreclosed. It appeared that the lease was for five years, that the original lessor continued to be the owner of the building for five months, during which he kept the building heated at all hours of every day, including Sundays and holidays; that, after the defendant became owner, his agent without objection continued so to furnish heat for nine months more, when the defendant notified the plaintiff that he would not furnish heat at night nor on Sundays or holidays. *Held*, that evidence of such conduct of the original lessor and the defendant was admissible to show the construction put upon the ambiguous provision of the lease by the parties themselves, and that their interpretation as shown by their conduct was of great importance in determining the meaning that the parties intended should be given to that provision.

In the suit above described, it also was *held* that the defendant, having agreed, as mortgagee, at the making of the lease, to be bound by its terms in case he foreclosed his mortgage before its termination, could not, after such foreclosure, place upon the lease an interpretation different from what the original parties intended and adopted as their construction of its provisions.

BILL IN EQUITY, filed in the Superior Court on October 29, 1918, by the New York Central Railroad Company, lessee of the Boston and Albany Railroad, and W. G. McAdoo, the then Director General of Railroads, seeking specific performance of the provisions

of a lease for five years made by the owners of a seven-story building numbered 57 Kneeland Street, in Boston, which the defendants, then mortgagees of the premises, assented to and agreed to be bound by in case they foreclosed their mortgage before termination of the lease. The prayers of the bill were in substance that the defendants be required to furnish the plaintiff heat on Sundays and holidays and between the hours of six o'clock in the afternoon and seven o'clock in the morning.

The suit was heard by *J. F. Brown, J.* He found that the "rest of the building on Kneeland Street is occupied by stores and manufacturing establishments. It appeared that the custom in Boston is to heat office buildings from eight o'clock A.M. to six o'clock P.M., and manufacturing establishments from seven o'clock A. M. to six o'clock P. M., unless the lease calls for heat beyond those hours, but that it is customary to insert in such leases a clause that 'during reasonable and customary business hours the lessors are to furnish to the lessee steam for heating the premises in the heating season,' or similar clauses." The judge made certain other findings of fact which are described in the opinion, ruled that the suit could not be maintained, and at the request of the plaintiffs reported the case to this court for determination.

The case was argued at the bar in March, 1919, before *Rugg, C. J., De Courcy, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices.

G. H. Fernald, Jr., for the plaintiffs.

C. S. Hill, for the defendants.

CROSBY, J. The plaintiffs leased from the owners the second and third floors and part of the first floor and basement of a building, to be occupied as a freight office for their freight terminal in Boston. The lease was in writing and the defendants, as mortgagees of the property, assented to it and agreed to be bound by its terms if they foreclosed the mortgage before the expiration of the lease. The bill seeks to enforce specific performance of the lease, which provides "that the demised premises shall be heated by the lessors to a proper warmth for office purposes." The judge of the Superior Court before whom the case was tried ruled that upon the facts recited in the report the bill could not be maintained, and reported the case to this court.

It is recited in the report that "it is necessary for the proper

operation of the railroad for it to operate freight trains on Sundays and at night;" and that "It appeared in evidence that other transportation companies in Boston, namely: the Boston and Maine Railroad, the New York, New Haven and Hartford Railroad Company and the American Railway Express Company keep their freight offices open twenty-four hours in the day, Sundays and holidays included, and properly heated, although the force of clerks on duty at night and on Sundays and holidays is smaller than on week-days and varies according to the amount of business, and that it is necessary for the handling of freight to keep a force of clerks at the freight offices continuously;" and further, that the plaintiffs entered into possession of the premises in August, 1917, and have continued in possession over since, except that since December 28, 1917, the railroad has been operated by the federal Director General of Railroads.

The lessors kept the premises heated to a proper warmth for office purposes continuously twenty-four hours in the day, including Sundays and holidays, until February 16, 1918, when the defendants made an entry on the premises for the purpose of foreclosing their mortgage, but left the building in charge of the lessors, who continued to furnish heat as previously. The defendants' agent in charge of the building in March, 1918, learned that heat was furnished night and day and continued so to furnish it until November, 1918, when the defendants notified the plaintiffs that they would not thereafter furnish heat at night or on Sundays or holidays. During the previous winter the lessors had difficulty in obtaining coal for heating the building and the plaintiffs furnished them with about twenty-five tons for that purpose. The lessors promised to pay for the coal but failed to do so; and afterwards the plaintiffs, with the consent of the defendants' agent, deducted from the rent due the defendants the cost of the coal.

The broker of the lessors, who negotiated the lease with the plaintiffs' representative, was told by the latter that the premises were to be used by the railroad as a freight office for its freight terminal in Boston, and would be occupied by a night force as well as a day force; and while the lessors were not told by their broker that the office would be open night and day, still they

knew that the premises were to be used by the railroad as a freight office for its freight terminal.

The provision in the lease "that the demised premises shall be heated by the lessors to a proper warmth for office purposes," relates only to the degree of heat to be furnished and not to the time during which heat is to be furnished. Upon that question the lease is silent. In this respect the covenant is ambiguous and of doubtful meaning, and evidence was properly admitted to show the conditions and circumstances under which it was made in order to ascertain the true meaning of its language as it was used by the parties. If the true import and meaning of a written instrument is doubtful and the intention of the parties cannot be determined from its language, it will be construed most strongly against the person using the uncertain language. *Foternick v. Watson*, 184 Mass. 187. *Bascom v. Smith*, 164 Mass. 61. *Barney v. Newcomb*, 9 Cush. 46. The evidence of the custom in Boston of heating office buildings from eight o'clock in the morning until six o'clock in the evening, and manufacturing establishments from seven o'clock in the morning to six o'clock in the evening, is not decisive as to the rights of the parties. The report shows that the lessors knew before the lease was executed that the premises would be used by the plaintiffs as a railroad office at its freight terminal; it also appeared that it was necessary for the proper operation of the railroad for it to run freight trains on Sunday and at night when passenger traffic is light, and there was evidence that for the handling of freight it was also necessary to keep a force of clerks at the freight offices continuously. Upon this evidence it could not have been ruled that the plaintiffs were not entitled to have the premises heated twenty-four hours in the day, including Sundays and holidays. *Reynolds v. Boston Rubber Co.* 160 Mass. 240, 245. *Strong v. Carver Cotton Gin Co.* 197 Mass. 53. *W. T. Tilden Co. v. Densten Hair Co.* 216 Mass. 323.

As the language of the lease was uncertain and doubtful as to the length of time heat was to be furnished, the evidence that from the time the plaintiffs entered into possession in August, 1917, the lessors kept the premises heated continuously twenty-four hours each day until February 16, 1918 (when the defendants made an entry for the purpose of foreclosing their mortgage),

was admissible to show the interpretation which the original parties placed upon the lease. The evidence that the defendants after taking possession continued to furnish heat continuously, without objection, until November, 1918, and paid the plaintiffs for coal furnished by them so to heat the building, was also admissible to show the construction which the defendants after taking possession placed upon the provision of the lease in question. Where the terms of a written instrument are not clear and explicit, the interpretation which the parties have placed upon it is of great importance in determining its true meaning. *Stone v. Clark*, 1 Met. 378. *Lovejoy v. Lovett*, 124 Mass. 270. *Jennings v. Whitehead & Atherton Machine Co.* 138 Mass. 594. *Slack v. Knox*, 213 Ill. 190.

Aside from the conduct of the defendants as mortgagees, they, having expressly assented in writing to the lease and agreed to be bound by its terms, cannot now avoid its provisions and place upon it an interpretation different from what the original parties intended. As the meaning of the covenant was doubtful and its true construction depended upon extrinsic evidence to explain it, and thereby show the intention of the original parties, the defendants under their agreement were bound by the construction adopted by the parties. *Bascom v. Smith*, 164 Mass. 61, 78. While it appears that the heating plant was so arranged that heat could not be furnished to the plaintiff without heating the rest of the building, still there was nothing to show that provision could not be made to limit the heat furnished to other tenants to such times as they were entitled to it.

As in the opinion of a majority of the court it properly could not have been ruled that the bill could not be maintained, the entry must be, ruling reversed, and case to stand for further hearing. The nature of the relief to which the plaintiffs are entitled, if it turns out that they are entitled to relief, is not now before the court.

So ordered.

NELLIE J. VARNUM, administratrix, vs. ALEX KOGIOS
& others.

Middlesex. March 10, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Mechanic's Lien. Contract, Building contract.

An instrument in writing signed by a building contractor and the owner of certain real estate, stating merely, "I herewith agree to furnish all necessary material for building on" a certain street in a city for the owner, naming him, "as follows," followed by a statement of the cost per hour of carpenters and laborers to be employed and by provisions as to prices to be paid for materials and as to payments by the owner, does not fulfil the requirement of Sts. 1915, c. 292; 1916, c. 306, as to a mechanic's lien, that, in order for a contractor to establish his lien, he must show that he made a written contract with the owner.

BILL IN EQUITY, filed in the Superior Court on July 17, 1918, under Sts. 1915, c. 292; 1916, c. 306, for the enforcement of a mechanic's lien.

The contract dated October 27, 1917, referred to in the opinion, was as follows:

"Lowell, Mass., Oct. 27, 1917.

I herewith agree to furnish all necessary material for building on Little Street, Lowell, Mass., for Mr. Alex. Kogios as follows:—

All carpenters to cost 72 cts. per hour.

All laborers to cost 55 cts. per hour.

All material furnished and all sub-contracts carried by me will be charged to owner at the rate of 10% on lowest submitted price as approved by owners and architects.

Payments to be made upon certificate of architect between the first and tenth day of each month for 80% of amount of work done.

Balance to be thirty-one days after work is finished.

Witness for both,

Harry P. Graves, Architect.

Contractor — Percy E. Varnum

Owner — Alex Kogios."

The suit was referred to a master, and afterwards was reserved by *Hitchcock, J.*, upon the pleadings and the master's report for determination by this court.

F. S. Harvey, for the plaintiff.

A. S. Howard, for the defendants.

CARROLL, J. This is a bill in equity under St. 1915, c. 292, as amended by St. 1916, c. 306, to enforce a mechanic's lien on the property of the defendant Kogios. The case was referred to a master.

The plaintiff's intestate, Percy E. Varnum, on October 27, 1917, made a written contract with Kogios, a copy of which appears above. On November 1, 1917, before beginning the work upon the building, Varnum signed and recorded in the registry of deeds this notice: "Notice is hereby given that by virtue of a written contract, dated October 27, 1917, between Alex Kogios, owner, and Percy E. Varnum, contractor, said contractor is to furnish labor and material for the erection, alteration, repair, or removal of a building on a lot of land described as follows: Situated in Lowell, Middlesex County, Massachusetts, on Little Street, and more particularly described and set forth in a deed to said owner given by Robert G. Bartlett, dated September 18, 1916, and recorded in the Registry of Deeds for the Northern District of said County in Book 561, Page 311, to which deed reference is hereby made for a more particular description of the premises hereby referred to. Said contract is to be completed on or before May 1, 1918." The master found that no specific date was agreed upon for the completion of the work; and also, that from October 27, 1917, to May 1, 1918, was a reasonable time for the performance of the work mentioned in the contract. At or about the time the agreement was signed, the parties orally agreed that Varnum should supply certain lime, cement, sand, iron and steel, and all labor and material necessary to complete the carpenter work; and Kogios was to furnish all additional material and labor.

Varnum began work November 5, 1917, and continued until December 8, 1917, having to that time furnished labor and materials to the value of \$2,750. On December 27, 1917, the defendant Sullivan lent Kogios \$2,200, which was paid to Varnum, being the sum due him December 1, 1917. At this time Kogios

executed to Sullivan a mortgage on the premises for \$6,000, to secure a loan of \$2,200 and further sums to be thereafter advanced by Sullivan to Kogios. On the same date, a written agreement was made by which Varnum was to complete the work "as carpenter upon said building." He was to begin at once and "continue until finished with reasonable allowance for weather." Varnum completed the work April 22, 1918.

St. 1915, c. 292, as amended by St. 1916, c. 306, provides that when a contractor has furnished labor or material in the erection, alteration, repair, or removal of a building, in order to establish a lien for labor and material supplied he must show that he made a written contract with the owner and that notice of the contract was filed or recorded in the registry of deeds. If there is an extension of the written contract, a notice thereof stating the date to which it is extended, is required to be filed in the registry of deeds prior to the date "stated in the notice of a contract for the completion thereof." The statute requires not only the existence of a contract, but that the contract be in writing.

The agreement of October 27, 1917, is not sufficient to fulfil the requirements of the mechanic's lien law. It is in effect a mere memorandum of a contract to be made in the future, where all the essential elements are not included and its terms are left uncertain. It does not show whether the work was to be done in the erection of a building, or in the repair or alteration of an existing structure. If, as matter of fact, it was understood a building was to be erected, it is not shown of what material it was to be constructed; if a building was to be repaired, it does not appear what repairs were to be made; and if any labor in addition to that of carpenters and laborers was to be supplied, it is not set out in the agreement. The agreement, dated October 27, 1917, is not such a written contract as is required by the mechanic's lien statute. See *Parker v. Anthony*, 4 Gray, 289; *Sanderson v. Taft*, 6 Gray, 533; *Wilder v. French*, 9 Gray, 393.

As the plaintiff cannot prevail for the reasons stated, it is unnecessary to consider the other objections to the maintenance of the bill which were argued by the defendant. St. 1915, c. 292, §§ 1, 2, 7, 8, 9. St. 1916, c. 306, § 2.

No notice was filed or recorded in the registry of deeds under the contract of December 27, 1917, and it is not contended that the plaintiff can recover under that agreement.

Bill dismissed.

HENRY F. WOODARD & another, trustees, vs. FREDERIC E.
SNOW & others, trustees, & others.

Suffolk. March 10, 11, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, & PIERCE, JJ.

Compromise of Controversy concerning Will. Will. Assignment. Equity Pleading and Practice, Decree. Estoppel. Contract, Repudiation. Equity Jurisdiction, To enforce assignment of part of claim for payment of debt.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will, which struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, was assented to by all parties in interest and by a guardian *ad litem* representing the interests of certain minors, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, by those named as executors in the will for confirmation of the agreement, all persons interested were parties and it was adjudged and decreed that the compromise was "just and reasonable" and a decree ratifying and confirming it was entered from which no appeal was taken and which never was reversed, such decree, whether erroneous or not, cannot be attacked in a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case, in which the rights of the parties are to be determined upon the footing of the provisions of the will as changed by the agreement of compromise and not upon a construction of the will as it appeared when offered for proof.

An assignment, by a beneficiary of a trust under a will, of an assignable vested expectant interest in the income of the trust, made in good faith for a valuable consideration to a trustee for certain of his creditors to be used for the payment of their claims, whether it be treated as a partial or a full assignment of income, cannot successfully be attacked by the assignor himself or by a trustee in bankruptcy of his estate appointed in proceedings begun more than four months after the assignment was effected.

Where a beneficiary under the provisions of a trust is entitled to a certain fractional portion of the income of the trust semiannually, such right is a present, equitable right of ownership which ripens into an ordinary property right when the income accumulated in the hands of the trustee becomes payable, and an assignee from the beneficiary of his interest in the trust succeeds to such right and may enforce it in equity.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 12, 1918, by the trustees under an assignment by Benjamin P. Cheney for the benefit of certain of his creditors against Benjamin P. Cheney, the trustees under the will of his father, who also was named Benjamin P. Cheney, and the trustee in bankruptcy of the son, to reach and apply to the payment of those creditors who were beneficiaries under the assignment the interest, if any, of the defendant Cheney under his father's will.

The suit was heard by *Crosby, J.*, who filed a memorandum of findings of fact and rulings of law, substantially as follows:

"In 1895 Benjamin P. Cheney, father of the defendant of the same name, died testate, and thereafter a controversy arose and objections were made to the probate of his will, which resulted in the filing of a petition in this court for a compromise of the respective claims of the parties. The defendant Benjamin P. Cheney was one of the executors and trustees named in the will and a petitioner for the compromise, and a defendant named therein as an individual. The agreement for compromise was approved by this court in 1896. The will was duly allowed, and thereafter the will and the compromise agreement were carried out and the defendant Cheney received, under the ninth paragraph of the agreement of compromise, payments of income from his father's estate. On April 6, 1914, the defendant Cheney executed and delivered to the plaintiffs an assignment of his income from his father's estate 'to the extent of eighty per cent thereof, but in no event to be less than \$50,000, provided the income shall amount to the sum of \$50,000,' to secure the payment of certain notes amounting to \$107,500. The plaintiffs are trustees for the holders of these notes. The trustees of the Cheney estate in writing acknowledged the assignment soon after its execution. Another instrument in writing, dated April 10, 1914, was also executed and delivered by Cheney to the plaintiffs. . . . The assignment to the plaintiffs above referred to was subject to two previous assignments given by Cheney to secure certain other indebtedness owed by him, all of which has been fully paid by the trustees. No part of the principal of the notes above referred to, amounting to \$107,500, has been paid to the plaintiffs or those whom they represent. On November 3, 1917, after paying all the sums due on the assignments given by Cheney previous to

the assignment to the plaintiffs, there remained in the hands of the trustees a balance of income due to Cheney amounting to \$15,586.77; there is also in the hands of the trustees due to Cheney the sum of \$23,000, which had accumulated as income on May 4, 1918. On December 28, 1917, an involuntary petition in bankruptcy was filed against Cheney in the District Court of the United States for the District of Massachusetts, and thereunder he was adjudged bankrupt on January 14, 1918. The claims represented by the plaintiffs have not been proved in bankruptcy. . . . The trustee in bankruptcy contends that the assignment to the plaintiffs is void as to him. The defendant Cheney seeks to repudiate the assignment given by him to the plaintiffs and contends that he was without power to make it, and that neither the plaintiffs nor the trustee in bankruptcy is entitled to any part of the income.

"I find that the assignment was given by Cheney to the plaintiffs for a present and valuable consideration; that it was given in good faith and without fraud, either actual or constructive, but was given to secure a valid existing indebtedness. I rule that the defendant Cheney was authorized in law to make the assignment and is estopped to repudiate it. Whether it is to be treated as a partial or a full assignment of income is in my opinion immaterial in view of my findings hereinafter stated.

"I find that the trustees in writing acknowledged the assignment when it was given by Cheney to the plaintiffs and never objected to it. I also find from all the evidence and the reasonable inferences to be drawn therefrom that the trustees not only recognized the assignment, but assented to it, and impliedly promised to pay the plaintiffs in accordance with its terms the amount due them thereunder after the amounts due upon the previous assignments had been paid, and that they never took any different position until they received notice from the defendant Cheney that he claimed that the income should be paid to him individually.

"I find that in this suit the trustees consider themselves merely stakeholders, and only decline to pay the amount in their hands to the plaintiffs because the defendant Cheney has made claim to the fund and requested that the trustees should not pay it to the plaintiffs.

"I am of opinion and rule that in this suit the trustee in bank-

ruptcy has no other or greater right to the income than Cheney in the absence of fraud, which I do not find exists, and so long as the assignment was not void at common law and was not made in contravention of any of the provisions of the bankruptcy act. I find and rule that it was not void at common law, and is not in violation of the bankruptcy act. I find it material that the plaintiffs did not know or have reasonable cause to believe that Cheney was insolvent at the time of the execution and delivery to them of the assignment of April 6, 1914, and of the instrument dated April 10, 1914.

"In view of my findings that the trustees of the Cheney estate recognized the assignment and assented to it and impliedly promised to pay the amount due, I rule that in equity at least it is valid whether it was an assignment of the whole income or a part of it, and that neither Cheney nor the trustee in bankruptcy is entitled to it, except as to such amounts as may be in excess of eighty per cent of the total income in any year, until the plaintiffs' claims have been satisfied.

"I find that the plaintiffs have paid insurance premiums amounting to \$2,070 on certain policies of insurance taken out by Cheney upon his life as additional security for indebtedness owed to the plaintiffs, which policies are held by them, and that they are entitled under the terms of the assignment to be reimbursed for such amounts so paid with interest.

"A decree is to be entered directing the trustees of the Cheney estate to pay to the plaintiffs the total amount of net income now in their hands which would otherwise be paid to the defendant Cheney under the ninth clause of the compromise agreement, and also directing the trustees to pay annually out of future income which may become due to Cheney under the ninth paragraph of the compromise agreement up to eighty per cent of the total amount thereof, and not less than \$50,000 annually (if it should amount to that sum), until the principal of the notes amounting to \$107,500 and interest, and the \$2,070 paid by the plaintiffs as premiums on life insurance and interest thereon, and other sums which hereafter may become due to the plaintiffs under the assignment have been fully paid. . . .

"The plaintiffs are to recover costs of suit as against the defendant Cheney and the trustee in bankruptcy."

By the agreement of compromise as to the will of Benjamin P. Cheney, the father of the defendant of that name, which, as stated in the opinion, was adjudged "just and reasonable" and was confirmed by a decree of the Supreme Judicial Court for Norfolk County, modifications were made in the will's provisions which, so far as material to this decision, were as follows:

The third article of the will, which, among other provisions, made an absolute gift to the defendant Cheney of \$100,000, was "stricken from said will." The ninth article also was "stricken from" the will. It read, so far as material, as follows: "Whenever and as soon as my sons shall respectively arrive at the age of thirty years, or in case of their marriage at an earlier age, then upon the event of such marriage, I direct my trustees to make an advancement to such son of the sum of one hundred and fifty thousand dollars in securities to be selected by said trustees at the par value thereof; . . . and thereafterwards I direct my said trustees to make an advancement of Fifty thousand dollars in like securities at par when each son shall attain the age of thirty-five years, and a like sum in like securities when each of said sons shall respectively attain the age of Forty years, of Forty-five years and Fifty years, each advancement of Fifty thousand dollars to be made in the securities of my estate to be taken at the par value thereof and selected by my said trustees . . ."

The entire twelfth article also was "stricken from" the will. So far as material it read as follows:

"If in the event of misfortune to either of my children, the gifts and advancements made to them should be lost, whether by error of judgment or otherwise, I authorize my said trustees to appropriate from such surplus income, such sums as in their discretion they may think reasonable and proper, and apply the same to the support of such child, and his or her children, and especially to exercise such discretion in favor of the issue of any child who may de cease before such final distribution without leaving sufficient estate or means of support for such issue. All such sums are to be charged as advancements to be deducted from the share of such child or his or her representatives in said final distribution and interest shall be computed on these advances."

A fifteenth article, which provided for a final distribution of

the estate after the death of the survivor of the testator's children, also was "stricken from" the will.

By the decree ratifying and confirming the compromise agreement, certain new provisions were added to the will, among others a provision giving to the defendant Cheney \$615,000 outright and a provision directing trustees of the residue as follows:

"Ninth. To divide the net income of the residue of the estate remaining after carrying out all the provisions of said will as hereinbefore modified by this agreement equally among the children of the said testator, such division and payment to said children to be made semi-annually during the lives of each. And in the event that any child shall die at a time intermediate between said payments, said trustees shall pay to the legal representatives of such child a proportionate part of said income; provided, however, that upon the death of any child of the testator the trustees shall pay and deliver a share of the principal of said residue held by them and not needed for carrying out any provisions of this trust remaining unfulfilled, not including in such unfulfilled provisions the division among the children of the net income of the residue, which share shall be proportioned to the number of said children, including in the enumeration for the purpose of establishing such proportion such child so dying (but not including any child previously deceased whose share of principal has been previously paid over), to the executor or executors of such deceased child to be disposed of as provided in his or her will, or, if such child shall die intestate, to his or her legal representatives to pass or be distributed under the Statutes of descent and distribution then in force in this Commonwealth."

A final decree was entered in accordance with the order of the single justice. The defendant Cheney and the defendant Forbes, trustee in bankruptcy, appealed.

S. M. Child, for the defendant Cheney, individually.

J. W. Burke, (*J. L. Hall* with him,) for the defendant Forbes, trustee in bankruptcy.

R. Cushman, (*R. G. Dodge* with him,) for the plaintiffs.

PIERCE, J. This is a suit in equity brought by the plaintiffs, as trustees for certain creditors of the defendant Benjamin P. Cheney under a trust for such creditors created and established

by a sealed agreement and an assignment dated respectively April 6 and April 10, 1914, against the trustees under the will of Benjamin P. Cheney, the father of the defendant of that name, to reach and apply the interest, if any, of the defendant Cheney under the will to the payment of the claims of the aforesaid creditors against Cheney as established by the instrument of trust.

In 1895 Benjamin P. Cheney died testate. By a decree of the Probate Court for the County of Norfolk his will was admitted to probate and the defendant Cheney was duly appointed one of the executors and trustees thereof. An appeal from said decree was taken by the widow and certain heirs to the Supreme Judicial Court for said county. While the appeal was pending, an agreement by compromise was executed by all persons who would "be entitled to the estate . . . under the statutes regulating the descent and distribution of intestate estates," "subject to the approval of the Supreme Judicial Court." After the appointment of a suitable person to represent certain minors interested under the provisions of said will and all future subsequent interest which may arise under the same, and upon the report of that person that the compromise and agreement "sought by said bill to be confirmed by the decree of this court is just and reasonable in its effects upon the interests of such minors and such future contingent interests, . . . is just and reasonable," a single justice of this court, by decree entered March 27, 1896, and unreversed, found the compromise and agreement "is just and reasonable" and ordered that the written agreement of compromise be "ratified and confirmed." He also ordered "that the decree of the Judge of Probate for Norfolk County allowing and approving said instrument purporting to be the last will and testament of said Benjamin P. Cheney be affirmed, as provided in and subject to the terms of said agreement."

The defendant Cheney's first contention is that the interest given him by the will was one which could not be assigned.

His second proposition is that under the decisions of this court (see *Ellis v. Hunt*, 228 Mass. 39; *Baxter v. Treasurer & Receiver General*, 209 Mass. 459) parties in making a compromise of a controversy as to the validity of an alleged will under the statutes (now R. L. c. 148, §§ 15-18) have no right to make a new will for

the testator, and from this it follows (especially when the compromise is carried out by the will being admitted to probate) that the nature of the interest given a legatee is that described in the will.

In the case of the agreement of compromise of the will of the defendant Cheney's father, here in question, the parties did undertake to change the nature of the interest given to the defendant Cheney, and the agreement of compromise was confirmed by a decree of a single justice of this court made on March 27, 1896.

By the agreement of compromise, which was confirmed by this decree, the interest given to the defendant Cheney was an interest which could be assigned. The decree confirming this agreement of compromise has not been reversed. Whether that decree was or was not an erroneous one is not material. This court had jurisdiction of the parties and of the subject matter of the cause in which that decree was made. It follows that this unreversed decree is the law of this case and that the rights of the parties are to be determined upon the footing that the terms of the will were changed by the agreement of compromise and not upon a construction of the will as it appeared when offered for probate.

Under the unrevoked decree of this court the defendant Cheney had an assignable interest to the amount of \$615,000, and also a vested assignable expectant interest in the income from a trust estate, which he could sell or assign in payment of or to secure the payment of any present or future maturing obligations. *Richardson v. White*, 167 Mass. 58. *Putnam v. Story*, 132 Mass. 205, 212. *Holbrook v. Payne*, 151 Mass. 383. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, ante, 20. The single justice of this court upon the evidence reported by the commissioner was warranted in finding, as he did, that the instrument of assignment and agreement, under which the plaintiffs make claim to the fund in the hands of the trustees, was given by Cheney "to the plaintiffs for a present and valuable consideration . . . in good faith and without fraud, either actual or constructive," and "was given to secure a valid existing indebtedness." As the assignment was made in good faith upon a present consideration for the payment, and securing the payment of an admitted obligation of Cheney to

some of his creditors, and was made more than four months before the commencement of bankruptcy proceedings against Cheney, it was good between the parties and against the trustee in bankruptcy, whether the assignment be treated as a partial or full assignment of income. *Bridge v. Kedon*, 163 Cal. 493; *S. C. 43 L. R. A. (N. S.) 404*, and cases collected. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, ante, 20.

The right of Cheney and the right of the assignee to receive the income of the trust fund was a present, equitable right of ownership which ripened into an ordinary property right when the income, accumulated in the hands of the trustee, became payable under the terms of the trust; and was not a right or an assignment of a right in a debt to be created in the future or of the bare possibility of there ever being such a debt. *Wainwright v. Sawyer*, 150 Mass. 168. *Cummings v. Stearns*, 161 Mass. 506. *Huntress v. Allen*, 195 Mass. 226. *Clarke v. Fay*, 205 Mass. 228. We are of opinion that the trust in favor of the plaintiffs attached to any undistributed income in the hands of the trustees after payment in full of the two prior assignments.

The decree of the single justice should be affirmed, with costs.

Decree accordingly.

JOSEPH WHEELER vs. CITY OF BOSTON & others.

JAMES F. KIMBALL vs. HEALTH COMMISSIONER OF THE CITY
OF BOSTON & another.

Suffolk. March 11, 12, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Board of Health, Municipal. Garbage. Municipal Corporations.

It is within the limits of the police power for a municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transportation through its streets and final disposition of garbage, which is an actual and potential source of disease and a detriment to the public health and may easily become a public nuisance.

An ordinance of the city of Boston, providing that "No person, other than employees of the city, . . . shall in any street carry . . . house offal or other refuse matter . . . except in accordance with a permit from the commissioner of public works

approved by the board of health," and a regulation by the board of health, adopted as a health measure because of difficulty experienced in placing responsibility for nuisances created by failure of some persons theretofore holding permits to collect garbage regularly and in a sanitary manner, but who were irregular, slovenly and offensive in their methods, which regulation prohibited the transporting of garbage through the public ways of the city except by the city or its contractors and their agents, are justifiable as reasonable exercises of the police power.

Accordingly, where the city officials, acting in good faith, have issued a permit to collect and dispose of the city's garbage to a corporation which acts under a contract with the city and for its own profit, a petition for a writ of mandamus cannot be maintained to compel them also to issue to a farmer in a nearby territory a permit to collect garbage at certain hotels and restaurants and to transport it to his farm, although the petitioner has had such a permit from the city for years, has done the work in a careful and entirely satisfactory manner and without offence to the senses or harm to the health of the community, and suffers a pecuniary loss by being deprived of the privilege of continuing to do so.

PETITIONS, filed on May 23, 1918, and afterwards amended, against the city of Boston, its commissioner of public works and its health commissioner for writs of mandamus directing the granting and approving of permits to the petitioners to convey garbage through the streets of Boston.

The cases were ordered to be tried together and were referred to an auditor. The auditor filed a report and, upon recommitment, a supplementary report, and the cases then were heard by *Braley, J.*, upon the petitions and answers, certain facts agreed to and the auditor's reports. He found the facts as they were stated in the auditor's reports, which facts are described in the opinion, and reported the cases to the full court for determination.

C. P. Sampson & C. F. Eldredge, for the petitioners.

J. P. Lyons, for the respondent city of Boston and others.

J. A. Sullivan, for the respondent Boston Development and Sanitary Company.

RUGG, C. J. These are petitions for writs of mandamus. They are brought to compel the appropriate public officers of the city of Boston to grant and approve permits to the petitioners, who are farmers doing business in neighboring towns, to convey garbage through the streets of Boston on its way to their farms, there to be fed to swine.

The pertinent facts are, that the petitioners have for the collection and transportation of garbage modern and sanitary appliances, which are kept clean and wholesome, and that they have

been accustomed for several years to do this work in a careful and entirely satisfactory manner without offence to the senses or harm to the health of the community. They have made mutually advantageous arrangements for the collection of their garbage with the proprietors of certain large hotels and restaurants in Boston, who desire to have the petitioners continue to do this work. The petitioners have been granted permits from the municipal officers of Boston for several years. Their methods in the use of the permits have always been approved by the health authorities. In 1912 the city of Boston made a contract with the Boston Developing and Sanitary Company, one of the defendants, wherein it agreed to collect garbage from the part of Boston wherein are located the hotels and restaurants from which the petitioners have been collecting garbage, and to deliver it to that company at designated stations. This contract is still in force. In 1914 the city of Boston made a contract with the same company for the collection of hotel and restaurant garbage within the same area. That company has a reduction plant at Spectacle Island in Boston Harbor and declines to permit the petitioners to collect garbage under its patronage.

By R. L. c. 25, § 14, a city may make contracts "for the disposal of its garbage." R. L. c. 26, § 2. *Clarke v. Fall River*, 219 Mass. 580, 583.

It is provided by the Revised Ordinances of Boston of 1914, c. 40, § 14, that "No person, other than employees of the city, . . . shall in any street carry . . . house-offal or other refuse matter . . . except in accordance with a permit from the commissioner of public works approved by the board of health." In 1914 the board of health of Boston passed this regulation: "At a meeting of the Board of Health held this day, it was voted to adopt the following regulations: Whereas, kitchen swill and garbage in the City of Boston are a source of filth and are capable of containing and of conveying contagion and of creating sickness, thereby endangering the public health and safety; and, Whereas, in the opinion of the Board, municipal collection and removal of the entire mass of kitchen swill and garbage in the City of Boston is necessary to preserve the public health and safety; Ordered, that no person, firm or corporation, other than the City of Boston or the city contractors or their agents, shall carry, convey or

transport through the alleys, streets or public places of the City of Boston any kitchen swill or garbage consisting of any refuse accumulation of meat, fish, fowl, fruit or vegetable matter." This regulation was adopted for the reasons therein set forth as a health measure because of difficulty experienced in placing responsibility for nuisances created by failure of persons theretofore holding permits, other than the petitioners, to collect garbage regularly and in a sanitary manner, but who were irregular, slovenly and offensive in their methods.

After the passage of this regulation the commissioner of public works refused to issue permits to the petitioners, not because they did not or were not able to comply with all proper rules respecting the collection of garbage, and not because of any complaint against their methods, but because he refused longer to issue any permits to any such persons. The board of health refuses to act in behalf of the petitioners. No permits to transport garbage through the streets of Boston have been granted since the adoption of the regulation by the board of health.

The situation as summarized by the auditor is this: "There is little controversy as to the facts. The city, having the responsibility of removing or causing to be removed offal and garbage that may be a menace to the public health, has adopted a system both of removal and disposal, employing as its agencies its own employees, its contractors, and the Boston Development and Sanitary Company, and as its agent for disposal it has adopted the Boston Development and Sanitary Company under a contract. In order to carry out and make effective its policy, it has undertaken to refuse permission to anybody except one of its own agencies to transport garbage through the streets. The Boston Development and Sanitary Company has erected a large reduction plant on Spectacle Island, and furnished scows for the transportation of garbage from the water-front stations to the Island. At the Island it treats all the garbage by a 'reduction' process, and extracts from it grease, oil, and other products of commercial value. The garbage is therefore of value to it."

There is nothing in the record which requires the inference that there is any bad faith in any of the conduct of the city officers. The natural import of all the facts is that the regulation

has been passed and enforced in an honest effort to conserve the public health and promote the general welfare.

The petitioners denounce the action of the commissioner of public works and of the board of health in refusing to grant them permits as unreasonable, and the enforcement of the regulation of the board of health as an unauthorized exercise of the police power.

The regulation of the board of health was passed under the authority conferred by R. L. c. 75, § 65, which requires that the board of health "Shall examine into all nuisances, sources of filth and causes of sickness within its town . . . which may in its opinion be injurious to the public health . . . and shall make regulations for the public health and safety relative thereto and relative to articles which are capable of containing or conveying infection or contagion or of creating sickness which are brought into or conveyed from its town." This section has been treated as applying to the board of health of Boston. *Train v. Boston Disinfecting Co.* 144 Mass. 523. *Commonwealth v. Drew*, 208 Mass. 493. See *Lynn v. County Commissioners*, 153 Mass. 40.

It was held in *Vandine, petitioner*, 6 Pick. 187, that a by-law forbidding the removal of house dirt and offal from Boston, except by those duly licensed, was a valid exercise of the police power in the interest of the public health. Much the same arguments there were considered and disposed of as have been urged by the present petitioners. That case goes far toward the decision of the case at bar. To the same effect is *Schultz v. State*, 112 Md. 211.

The precise question here presented has never arisen in this Commonwealth. It has been decided, however, in numerous other jurisdictions. An exactly similar case in principle, and one remarkably like it in all salient facts, is *Gardner v. Michigan*, 199 U. S. 325, 331, 332. It there was said: "The court may well take judicial notice that table refuse when dumped into receptacles kept for that purpose will speedily ferment and emit noisome odors, calculated to affect the public health. . . . The defendant insists that it is part of the common knowledge of the country that the refuse from kitchens, tables, hotels and restaurants is valuable as food for swine, and is property within the meaning of the constitutional provision which forbids the taking by any

State of private property for public use without compensation. Of course, all know that such a use of refuse is not uncommon in some localities. . . . Looking at the matter in a practical light, we are unable to say that the means devised by the city council and indicated by its action were plainly unreasonable or unnecessary or did not have a real, substantial relation to the protection of the public." It has been found by the auditor that title to the garbage rested in the petitioners. So far as concerns the property rights of the petitioners in the garbage after they had taken it from the hotel and restaurant keepers, it may be disposed of by what was said in the same opinion at page 333: "If it be said that the city might have adequately guarded the public health and at the same time saved the property rights of its owner on whose premises garbage and refuse were found, the answer is that the city evidently thought otherwise, and we cannot confidently say that its constituted authorities went beyond the necessities of the case and exceeded their proper functions when they passed the ordinance in question." This decision was rested in part upon *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, where at page 322 it was said respecting the rights of the collector of garbage: "Still less has the licensed scavenger a right to complain; for his right to convey garbage and refuse through the public streets, in covered wagons, was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt." The exact point here presented was decided in *Rochester v. Gutberlett*, 211 N. Y. 309, after a full discussion, in favor of the validity of the ordinance. The underlying principle upon which were decided the *Slaughter-House Cases*, 16 Wall. 36, supports the validity of the present regulation. Other decisions upon facts almost identical with those at bar and which uphold the reasonableness of the regulation, are *Dupont v. District of Columbia*, 20 App. D. C. 477, *State v. Orr*, 68 Conn. 101, 110, *Walker v. Jameson*, 140 Ind. 591, *Atlantic City v. Abbott*, 44 Vroom, 281, *Grand Rapids v. De Vries*, 123 Mich. 570, *O'Neal v. Harrison*, 96 Kans. 339, *Smiley v. MacDonald*, 42 Neb. 5, *Smith v. Spokane*, 55 Wash. 219, *Ex parte Howell*, 71 Tex. Cr. Rep. 71. So far as we are aware, there are no contrary decisions.

These decisions rest in general upon the idea that garbage is

widely regarded as an actual and potential source of disease or detriment to the public health, and that therefore it is within the well recognized limits of the police power for the municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transportation through the streets and final disposition of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all. *Commonwealth v. Alger*, 7 Cush. 53. *Commonwealth v. Wheeler*, 205 Mass. 384. *Commonwealth v. Titcomb*, 229 Mass. 14.

Of course police regulations must be reasonable both as to the end sought and the means employed. But in view of this great weight of authority in support of the validity of the regulation here assailed, it does not seem necessary to discuss the matter further, or to review and distinguish cases where the exercise of police power as to other objects has been held to transcend constitutional limitations.

Let the entry in each case be

Petition dismissed.

SAMUEL ORBACH vs. PARAMOUNT PICTURES CORPORATION.

Middlesex. March 12, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Damages, Loss of prospective profits. *Contract*, Performance and breach, Construction. *Evidence*, Competency. *Theatre*, For display of moving pictures.

At the trial of an action for the breach of contracts by a corporation, which was a distributor of moving picture films, to furnish to and to license the plaintiff to exhibit at his theatre in Lowell a certain number of films, each for three successive days, which portrayed certain well known and popular artists, the defendant contended that the contracts never were executed, but the jury found, on evidence warranting the finding, that the contracts were made as alleged. There was no performance by the defendant, and it contended that there was no evidence competent to show that the plaintiff had suffered any damage. The plaintiff introduced evidence tending to show what were his gross receipts week by week and what were his actual expenses during the period when, if the contracts had been performed, he would have been exhibiting the defendant's films; what his expenses would have been with the defendant's films during that period; what his gross receipts were week by week during the pre-

ceding year, when he showed films inferior to the defendant's; that, during the period in question, another theatre than his in Lowell, subject to the same conditions as to competition but at an inferior location and with a larger seating capacity, which was exhibiting the defendant's films, had crowded houses and turned patrons away; that the patronage of such theatres depended upon the particular artists who were being portrayed, and that the contracts in question called for films portraying first class artists in pictures never before exhibited in Lowell. *Held*, that the evidence was competent to give the jury a satisfactory basis on which to find substantial damages.

The contracts above described each contained a clause providing that either party to them, by a notice given within ten days after the exhibition of any picture, might limit the contract to one additional picture upon the delivery of which the contract should terminate. The defendant contended that the damages should be limited to the loss caused by the plaintiff being deprived of one picture under each contract. There was no evidence that the defendant gave any such notice as the contract called for. The judge instructed the jury that, in determining the extent of the plaintiff's damages, this possibility of termination of the contracts should be considered. *Held*, that the provision in the contract did not mean that the defendant might elect either to repudiate the contracts in the beginning or to terminate them by notice and that in either event damages should be limited to such as were caused by the loss of one picture under each contract; and that the instruction given by the judge was sufficiently favorable to the defendant.

CONTRACT, by amendment from a bill in equity for specific performance, filed in the Superior Court on September 14, 1917, for breach of six agreements in writing to furnish to the plaintiff films of moving pictures for exhibition in his theatre.

In the Superior Court the action was tried before *Hitchcock, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant asked for, and the judge refused to give, the following rulings among others:

"1. On all of the evidence the defendant is entitled to a verdict.

"2. The plaintiff has not established that a contract had been approved and executed by an authorized officer of the defendant company."

"6. If a contract for the delivery of motion pictures is for a given period but could be cancelled at any time, by either party, which cancellation to take effect after the delivery of two pictures, then the value of the contract is limited to two pictures.

"7. If the jury shall find that the contracts between the parties had been completed, they shall find that the same were for the delivery of two pictures under each contract which by their

terms contained the option of cancellation by either party after the delivery of two pictures.

"8. If the jury finds that the contracts were executed by the defendant, then notice by the defendant to the plaintiff on June 27, 1917, that his contracts had been rejected for the delivery of pictures must be construed as a limitation of the contracts to the delivery of two pictures only under each contract, and the defendant would be liable only for the non-delivery of two pictures for three days each under each contract.

"9. If the jury shall find that the contracts were executed by the defendant company, then the damages, if any, must be limited to the failure to deliver the pictures of the several stars in the aggregate for thirty-six days or six weeks."

"12. If the jury finds that the contracts had been executed by the defendant, then the fact that the plaintiff brought suit on September 14, 1917, shows an admission on the part of the plaintiff that the defendant had exercised its option to limit its contract to two pictures."

"17. If the jury finds that the contracts had been completed between the parties, then there is no satisfactory basis of comparison on which to reckon the profits, if any, which might have been received by the plaintiff if the defendant had fulfilled the contract.

"18. There are too many elements of uncertainty and conjecture to make it safe to rely on evidence such as the plaintiff offered."

"21. If on all the evidence the jury shall find that there was a contract between the plaintiff and defendant, then the plaintiff is entitled to nominal damages only for the breach of the same."

Material portions of the charge are described in the opinion.

The jury found for the plaintiff in the sum of \$6,427; and the defendant alleged exceptions.

F. N. Nay, (*M. L. Levenson* with him,) for the defendant.

A. S. Howard, (*B. Silverblatt* with him,) for the plaintiff.

DE COURCY, J. The plaintiff, who owned and operated the Owl Theatre in Lowell, seeks to recover damages from the defendant, a distributor of motion picture films, for breach of six written contracts. Under these agreements the defendant, during the year beginning September 1, 1917, was to release a certain number of films or plays, in which designated well known

"stars" enacted the leading role; and to license the plaintiff to exhibit one copy of each of the films at his theatre for three successive days, at a specified price. The defendant now concedes that there was evidence which, if believed, warranted the jury in finding that the alleged contracts were executed and delivered. No films were actually furnished, the defendant contending at the trial that no contract was executed. This disposes of the first and second requests for rulings, dealing with the issue of liability.

While admitting that the plaintiff is entitled to prevail, the defendant strongly urges that the evidence of loss sustained by the plaintiff by reason of the breach of contract was too remote and speculative to sustain a verdict for more than nominal damages. The trial judge in instructing the jury as to the general rule applicable adopted the following language of this court in *Lowrie v. Castle*, 225 Mass. 37, 51: "Prospective profits may be recovered in an appropriate action when the loss of them appears to have been the direct result of the wrong complained of and when they are capable of proof to a reasonable degree of certainty. They need not be susceptible of calculation with mathematical exactness, provided there is a sufficient foundation for a rational conclusion. . . . But such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty." There was evidence that at the time when the defendant repudiated its contracts and refused to furnish the films which it controlled, and which were of moving picture "stars" especially popular with theatrical patrons, it was too late for the plaintiff to secure adequate substitutes for the coming theatrical year; and that as a natural result, and one presumably within the contemplation of the parties, the audiences attracted to the Owl Theatre were diminished in number and the income correspondingly reduced. Speaking accurately, such loss would be the ordinary damage consequent on the defendant's failure to furnish the pictures as agreed, rather than a loss of "special profits."

In proving the loss he sustained, the plaintiff offered evidence (1) of the net profits of his theatre during the period involved, and (2) of what the net profits probably would have been during that period if the defendant had carried out its contracts. As to

(1) he presented a detailed report of the gross receipts from September 1, 1917, until he sold out his theatre in March, 1918; and it could be found that he obtained all the income he reasonably could. The actual expenses during this period were \$250 a week for film service, and \$250 for other expenses. Plainly this was competent. As to (2), the expenses of running the theatre if the plaintiff had obtained the defendant's pictures would not differ from those actually incurred, except in the larger sum to be paid for films, — which item could readily be ascertained. The only uncertain element to be established was the probable additional income which would have accrued if the plaintiff had been allowed to exhibit the films specified in the contracts. On that issue he showed the gross receipts of his theatre, week by week, during the preceding year, as well as after September 1, 1917; thus indicating what his theatre, located and appointed as it was, could earn even with pictures of a grade inferior to Paramount films. *Loughery v. Huxford*, 206 Mass. 324. *Nelson Theatre Co. v. Nelson*, 216 Mass. 30. Most significant was the evidence that the Merrimack Square Theatre, situated on a side street in the same city, while exhibiting these same Paramount pictures, and at the very time that the defendant had contracted to let the plaintiff have them, drew crowded houses and people were turned away. This theatre had a larger seating capacity than the Owl, and was subject to the same conditions as to competition. There was also evidence that the patronage of a theatre depends on the particular "star" who is being exhibited, that the Paramount had the "finest stars," as compared with those of other companies, and that the contracts contemplated "first run" pictures, that is pictures which never before had been exhibited in Lowell. Unlike cases such as *Todd v. Keene*, 167 Mass. 157, we cannot say as matter of law that the evidence afforded no satisfactory basis on which a jury would be warranted in finding more than nominal damages. We find no error in the refusal to give the defendant's requests numbered 17, 18 and 21. No exception was taken to the judge's charge. *Weston v. Boston & Maine Railroad*, 190 Mass. 298. *Gagnon v. Sperry & Hutchinson Co.* 206 Mass. 547. *Neal v. Jefferson*, 212 Mass. 517. *Nelson Theatre Co. v. Nelson*, *supra*. *Barry v. New York Holding & Construction Co.* 226 Mass. 14.

The remaining requests are based upon paragraph "Tenth" in the several contracts, which reads: "Either party to this agreement may, by notice by registered mail, given within ten days after the exhibition of any picture of said series in the Exhibitors' theatre, limit this contract to one additional picture, and upon the delivery for exhibition of said additional pictures, this contract will terminate with the same effect as if said picture were the last of the series above referred to." The trial judge instructed the jury that in determining the plaintiff's loss they should take into consideration this possibility that his contract might be terminated. It seems to us that this was sufficiently favorable to the defendant. By the express terms of the mutual cancellation provision the option was to be applicable only after the exhibition of at least one picture under the contract; and after notice by registered mail, within ten days after such exhibition, of the decision to limit the contract to one additional picture. As matter of fact the defendant never exercised its option to thus limit its liability. On the contrary, it expressly denied the existence of any contract. See *R. H. White Co. v. Remick & Co.* 198 Mass. 41, 49. When at the trial it contended for the first time that the plaintiff's damages must be limited to the failure to deliver for three days two pictures under each of the six contracts in suit, the option had continued in existence during the entire contract year without any attempt by the defendant to exercise it. See *Whiting v. Price*, 172 Mass. 240. The jury well might believe that if the defendant had once begun the delivery of pictures under its contract, acting in good faith and in accordance with sound business judgment, in all probability it would have furnished the full measure of performance under the contract, as being most profitable to itself in the circumstances. See *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 90. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 380.

We do not construe the tenth paragraph of the contract as giving the defendant the option to repudiate its contract from the beginning, or to perform it in part, and to permit it in either event to confine the plaintiff's damages to the loss occasioned by the non-performance of the alternative least beneficial to him. See *Sedg. Damages*, (9th ed.) §§ 421, 424a. *Watson v. Russell*, 149 N. Y. 388. It provided the defendant with an option which

it never exercised, and which it cannot now exercise after repudiating the contract in its entirety.

Exceptions overruled.

CLARENCE E. FREEMAN'S (dependent's) CASE.

Suffolk. March 13, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Dependency, Procedure: appeal, finality of findings of Industrial Accident Board. Evidence, Competency, Of intent.

A⁴ a hearing before a single member of the Industrial Accident Board of a claim by a mother for compensation for the death of her son, when sixteen years of age, from injuries arising out of and in the course of his employment by a subscriber under the workmen's compensation act, there was evidence that the son had come to Boston to go to school and work out of school hours, and before coming had told his mother that "he would send all his money home except his board and money for his clothes . . . for her support." Previous to coming to Boston he had lived at home and had paid his mother his wages, which were substantial in amount. His father was not in good health and was not able to support his family, consisting of his wife and five children. The mother testified that she was dependent upon the son for support. The son began going to high school in Boston, but, when he found that tuition was charged him, he left school and went to work for the subscriber, where he received fatal injuries on the second day of his employment. At that time he had received no wages from his employer and had not sent his mother any money since he had come to Boston. The mother did not know that the son had begun to work until she received news of his death. The single member of the board found that the mother was partially dependent upon the son. The full board confirmed this finding. *Held*, that,

(1) Under the provisions of the act, the question of dependency was to be determined in accordance with the fact, as the fact might be at the time of the injury, and that the finding of partial dependency could not be presumed erroneous in law;

(2) In view of all the facts, the circumstance, that the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned, was not in itself decisive;

(3) Evidence was admissible respecting the intent of the son to send to his mother the part of his wages which remained after paying for his board and clothing.

In the proceeding above described, it further appeared that, at the time of receiving the fatal injuries, the employee's weekly wages were \$12; that the amount he actually had earned during the preceding year was \$510, and that he had sent to his mother during that time \$350. There was some evidence that the employee received, besides the \$510, his board, but there was no such finding by the single

member or by the full board, nor any request for such a finding. There also was evidence that, of the money that the employee sent his mother, the mother spent a part for his expenses. The board made no finding upon this subject. *Held*, that,

(4) The "annual earnings of the deceased at the time of his injury" should be computed by adding together his actual earnings during that period, and not by multiplying his weekly wages at the time of his injury by fifty-two;

(5) No question was saved upon the record as to whether the wages earned by the employee during the year preceding his injury were affected by the fact that for a part of that time he received his board as well as money compensation;

(6) The amount of money contributed by the employee to his mother during the twelve months preceding his injury was a question of fact upon which the finding of the Industrial Accident Board was final;

(7) Expenses incurred by the mother on account of her minor son, while pertinent in determining the question of dependency, were irrelevant in ascertaining the amount of compensation to be paid after the fact of dependency had been established.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, in part affirming and adopting and in part revising the decision of a single member of that board, awarding compensation to Gertrude Freeman, mother of Clarence E. Freeman, a deceased employee, under Part II, § 6, of the act, as one partially dependent upon the employee at the time of his injuries.

The material portion of Part II, § 6, is as follows:

" . . . If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the association shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury."

Findings of the single member of the Industrial Accident Board, material to this decision, were as follows:

"The claimant was a dependent within the meaning of Part V, § 2, and partially dependent upon her son, the decedent, at the time of his injury and death, under Part II, § 6 of the act.

"The claimant received a total sum of \$350 from her son for her support during the year preceding the date of the injury. Previous to leaving home, shortly before the occurrence of the fatal injury, the employee had talked with his mother relative to sending her money for her support. He promised, when he went to work, that

he would send her all his earnings except his board and money for his clothes. On the day previous to the fatality, he accepted employment from the subscriber at an average weekly wage of \$12 and advised Mrs. Annie L. Billings and Merle Billings that it was his intention to pay his board, \$5, out of his earnings and send the balance home. . . .

"(b) As to the basis upon which dependency shall be computed, the board member is of opinion that the insurer is obligated to pay the claimant 'a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed (during the year preceding the date of his injury and death, \$350) . . . bears to the annual earnings of the deceased at the time of his injury.' The 'annual earnings of the deceased at the time of his injury' are \$624; that is fifty-two times his average weekly wages of \$12. The amount which would have been due the claimant, had she been wholly dependent, would be \$8 a week for a period of five hundred weeks. Since she is partially dependent, the amount due her is $350/624$ of \$8 or \$4.49 per week, for a period of five hundred weeks, subject to the provisions of the act."

Appended to the report of the single member of the board was a report of all the material evidence. The insurer asked the single member to make two rulings as follows:

"1. The employee left no dependents wholly or partially dependent upon his earnings for support at the time of his injury.

"2. There was no dependency in part at the time of the injury."

These requests were refused.

The full board affirmed and adopted the findings and rulings of the single member, except that they revised the decision in the paragraph above quoted and designated "b," finding and ruling instead as follows:

"The 'annual earnings' of the decedent at the time of his injury were the sums earned by him during the year immediately preceding the date thereof, which are shown by the record to be as follows: During the fall of 1917, \$150; during the winter of 1917-18, six weeks, \$108; during the summer of 1918, \$250; and one day's employment, for subscribers, \$2; total, \$510.

"The employee's contributions to the support of his mother during the year prior to the date of his injury and death were \$350.

Therefore, the insurer is obligated to pay the claimant 'a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed [\$350] . . . bears to the annual earnings [\$510] of the deceased at the time of his injury.' The employee's average weekly wages at the time of his injury and death were \$12; the amount due a person wholly dependent under Part II, Section 6, would be \$8; therefore, the amount due the claimant, who is partially dependent, is $350/510$ of \$8, or \$5.49 per week, for a period of five hundred weeks, subject to the provisions of the act."

The findings and decree of the board were confirmed by the Superior Court, and the insurer appealed.

G. Gleason, for the insurer.

J. J. Scott, for the claimant.

RUGG, C. J. The deceased employee, a boy sixteen years of age, came to Boston early in September, 1918. He began going to high school, but when he found that tuition was charged him he left school, went to work and on the twenty-sixth of the same month received fatal injuries arising out of and in the course of his employment. This was the second day of his employment.

1. There was evidence sufficient to support a finding of partial dependency by his mother on the earnings of the deceased. Before coming to Boston he had lived at home and had paid to his mother his wages which were substantial in amount. His father was not in good health and testified that he was not able to support his family, consisting of his wife and five children. The mother testified that she depended upon the wages of the deceased for support; that "Prior to leaving home, Clarence talked with her relative to sending her money for her support. He said that when he went to work he would send all his money home except his board and money for his clothes. . . . He told her he would send it to her for her support." He went to Boston to go to school and to work out of school hours. The mother did not know that the deceased had begun to work until she received word of his death, and he had sent her no money since he came to Boston. The question of dependency upon the earnings of a deceased employee under the workmen's compensation act is to be "determined in accordance with the fact, as the fact may be at the time of the injury." St. 1911, c. 751, Part II, §§ 6, 7; Part V, § 2. *Bott's Case*, 230 Mass. 152. The fact was

that at the time of his injury the deceased was at work for wages, which it was his declared purpose as well as his filial duty to send home. The circumstance that the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned is not by itself decisive. A simple expression of purpose to contribute to support, unaccompanied by any actual contribution after reasonable opportunity, would not constitute dependency. The case at bar, however, in substance and effect discloses injury to the employee before his first pay day and before any opportunity had arisen to make contribution to the support of the dependent out of the wages of the particular service and substantial contributions from the earnings of earlier work. Partial dependency may be found even though the dependent might have subsisted without the aid. *McMahon's Case*, 229 Mass. 48. The deceased was a minor; hence a duty rested upon him to turn his wages over to the parent entitled thereto, and a correlative right to receive such wages vested in the parent. *Tornroos v. Autocar Co.* 220 Mass. 336. The finding of partial dependency by the mother cannot be pronounced erroneous in law. *Kenney's Case*, 222 Mass. 401.

2. There was no error, under the circumstances here disclosed, in the admission of evidence respecting the intent of the deceased to send to his mother the part of his wages which remained after paying for his board and clothing. *Carriere v. Merrick Lumber Co.* 203 Mass. 322, 327. *Marcy v. Shelburne Falls & Colrain Street Railway*, 210 Mass. 197, 199.

3. The "annual earnings of the deceased at the time of his injury" in Part II, § 6, are to be ascertained by reference to the same factors as are "average weekly wages" in Part V, § 2, unless inapplicable under all the circumstances. It would be a strained construction to interpret "annual earnings" with reference only to the wages earned at the moment of injury and to calculate other payments under the act upon the footing of "earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury." The facts at bar presented a case for the ascertainment of "annual earnings" by reference to the wages received during the twelve calendar months immediately preceding the injury. See *Gillen's Case*, 215 Mass. 96.

4. No question was saved on this record to the point whether

the wages earned by the deceased in the year before his death were affected by the fact that for a part of the time he received his board as well as money compensation. Hence no decision of that matter is required.

5. The amount of money contributed by the deceased to his mother during the twelve calendar months before his injury was on this record a pure question of fact, on which the finding of the board is final. *Pass's Case*, 232 Mass. 515.

6. Expenses incurred by the parent on account of the son are pertinent in determining the fact of dependency, but irrelevant in ascertaining the amount of compensation to be paid after the fact of dependency has been established. *Dembinski's Case*, 231 Mass. 261. No error is apparent in this particular.

Decree affirmed.

SADIE B. SANDON, administratrix, vs. MINOTT K. KENDALL.

Worcester. March 14, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Toward employee of independent contractor, Volunteer. *Agency*, Existence of relation, Scope of authority.

The owner of certain poles, delivered to him in a railroad car in a railroad yard, made a contract with a teaming contractor to unload the poles and carry them to designated locations, the owner undertaking to have the car moved where the teaming contractor wished. At the unloading of the car there were present two employees of the teaming contractor and an employee of the owner. The contractor used a gin pole twenty-five to twenty-eight feet in height to remove the poles from the car, the foot of the pole being placed in a hole in the ground eighteen inches to two feet deep and its base being secured to the railroad rail and to the side of the car. It becoming necessary to move the car after it had been partially unloaded, the employee of the owner gave orders to the teamster's employees to hitch horses to the front of the car, to loosen the supporting chains and to move the car without taking down the gin pole or taking further precautions. The employees of the contractor being unable to move the car, a passerby, not in the employ either of the owner or of the contractor, was asked by an employee of the contractor to "give us a hand." As he was complying with the request, the pole fell upon him and he was killed. At the trial of an action against the owner of the poles to recover for causing the death, the jury found for the plaintiff, and, upon exceptions by the defendant, it was held, that

(1) The questions, whether the decedent was in the exercise of due care or had assumed the risk of the injury, were for the jury;

(2) There was evidence of negligence on the part of the defendant's employee in directing the moving of the car without removing the gin pole or taking proper precautions for its support;

(3) There was evidence warranting a finding that the defendant's employee had at least implied authority to direct the moving of the car;

(4) There was evidence that the employee of the contractor had implied authority from the contractor to call the decedent to assist in moving the car;

(5) It could not be ruled as a matter of law that the contractor's employees, in obeying directions of the employee of the owner of the poles as to moving the car, became his fellow servants;

(6) The evidence warranted findings that the decedent, in assisting the employee of the contractor at his request, became his fellow servant;

(7) It could not be ruled as a matter of law that the decedent was a mere volunteer or a licensee to whom the owner, or his employee, owed no duty of carefulness; and, if it were found that he had become a fellow servant of the employees of the contractor, he was owed the same duty as was owed to them by the owner and his employee.

(8) A verdict for the plaintiff was warranted.

TORT for causing the death of the plaintiff's intestate, Joseph E. Bergeron. Writ dated October 6, 1917.

In the Superior Court the action was tried before *Fox, J.* The material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered for him. The motion was denied. He then asked for rulings, the following of which were refused:

"1. On all the evidence, the plaintiff is not entitled to recover against the defendant in this action."

"4. If the jury find that the plaintiff's intestate was asked by a servant of Newell to aid in moving the car, and was killed by helping to move the car in response solely to that invitation, the plaintiff cannot recover against this defendant."

"6. One volunteering to help in the work of some one other than his employer, in which work he himself or his employer has no personal interest, has no greater rights in the matter of recovery for injury, than an employee of the person to help in whose work he volunteered.

"7. The plaintiff's intestate cannot in any event recover except under circumstances where an employee of the defendant might recover."

"9. The defendant owes the plaintiff's intestate no greater duty than he owed his employee — Lee.

"10. One who without protecting or promoting any interest of his

own assists in the service of another cannot recover for injury while so acting, nor can there be recovery for his death while so acting, unless the injury or death was the result of wanton or wilful misconduct.

"11. A master owes no duty except to prevent wanton or wilful injury to one who without protecting or promoting any interest of his own, assists in the master's service."

"15. It cannot be fairly presumed from the evidence in this case that Lee had authority to ask of the plaintiff's intestate temporary or transient assistance, whereby the defendant became responsible for Lee's negligence."

"18. One who is employed by a servant as an emergency assistant in doing a master's work, becomes subject to all the obligations of a servant, and can recover for injury only under the circumstances where a servant directly employed by the defendant could recover.

"19. If the jury find that the work being done at the time of the injury of the plaintiff's intestate, was being done by an independent contractor, the plaintiff cannot recover in this action.

"20. If the jury find that the work being done at the time of the injury of the plaintiff's intestate was done under the direction of the servant of Newell, the plaintiff cannot recover in this action.

"21. If the servant of Newell had authority from Newell to direct the work of unloading the car, and Lee had no such authority, the plaintiff cannot recover, if Lee, without authority from the defendant, wrongfully assumed to direct such work."

"23. If the plaintiff's intestate was an employee of the defendant within the meaning of the workmen's compensation act, there can be no recovery in this action."

"26. If the jury finds that Lee was in charge over Newell's men, Paine and Gray, in unloading and moving the car, Bergeron by his act in helping did not become a servant of Newell.

"27. If the jury find that Lee was in charge over Newell's men, Paine and Gray, in unloading and moving the car, Bergeron by his act in helping became a servant of the defendant, rather than of Newell, and cannot recover.

"28. In any event, Bergeron can be in no better position than that of a servant of the defendant, if the jury find Lee was in charge over Newell's men, Paine and Gray."

The defendant's fifth ruling, which, as stated in the opinion, was given, was as follows:

"There is no evidence to warrant a finding that Lee had authority to bind the defendant in the matter of securing the aid of the plaintiff's intestate in moving the car."

The jury found for the plaintiff in the sum of \$1,750; and the defendant alleged exceptions.

C. H. Donahue, (*W. E. Waterhouse* with him,) for the defendant.

G. R. Farnum, (*E. E. Ginsburg* with him,) for the plaintiff.

DE COURCY, J. The plaintiff seeks damages for the death of her intestate, Joseph E. Bergeron, who was struck by a falling "gin pole," receiving injuries from which he died without conscious suffering. There was evidence to warrant the finding of the following facts:

The defendant had a contract to erect poles and wires for an electric line from Uxbridge to Milford. He engaged one Newell, who was in the teaming business, to unload the poles from the cars in the railroad yard at Uxbridge, and to carry them to designated locations. A gin pole was used for lifting the poles from the car and putting them upon a wagon or "reach." This pole was like a single mast derrick without guys; it was twenty-five to twenty-eight feet in length, was set in a hole in the ground eighteen inches to two feet deep, and was secured to the railroad track and to the car by chains. In the process of the work of unloading it became necessary to move the partially unloaded car. The defendant was not there at the time, but one Lee, his only employee on the job, gave orders to have the car moved and told Newell's men to hitch on the horses to the front of the car. Two of Newell's men were there at the time, Paine and Gray. The chains were taken off, and the gin pole was pried away from the car about two inches, to enable them to move the car by the pole. Bergeron, who was not in the employ of either party, came along, and Gray asked him to "give us a hand." Bergeron put his shoulder to the car, and was pushing it with the other men when the pole fell and struck him, fatally injuring him.

The questions of the intestate's due care, and his assumption of the risk, plainly were for the jury, and the burden of proof was on the defendant.

There was evidence to warrant a finding that the accident was due to Lee's negligence. He gave the orders to move the car with-

out taking down the unsupported gin pole, as was customary, and without taking any precautions to prevent its fall, although it showed signs of being unsteady.

The jury could find also that Lee was acting within the scope of his employment in giving directions to move the car. Newell, who was an independent contractor, testified, "we had nothing to do with moving the cars, we simply unloaded the poles;" and Smith, the representative of the defendant who engaged Newell, testified that he "asked . . . where he [Newell] wanted the car left to be convenient for unloading and said he would have it placed wherever Newell wished." Lee was the only representative of the defendant on the job. The jury could infer that he had at least implied authority to attend to the moving of the car. They were not obliged to accept the testimony that his only duty was to show Newell's men where to place the poles. In fact Newell testified that Lee was "in charge of this team," that "he [Newell] told his men when they left the stable to do what the man in charge told them," and that he heard Lee give orders to these men.

As the defendant argues, the case did not go to the jury on the theory of the workmen's compensation act with the defences removed; and if Bergeron became in fact the fellow servant of Lee the defendant would not be liable, under the present declaration, as the negligence relied on would be that of a fellow servant. In this connection the judge gave the defendant's fifth request, and called to the jury's attention the theory on which the plaintiff was proceeding in the case, "that it was not Lee who called for Bergeron but that it was Gray, one of Newell's employees, who called him for help, and that then Bergeron having been called on the job by Gray stands in the same position with regard to the employer of Lee that Gray would himself have stood in if he had been hurt." We cannot say as matter of law that there was no evidence to warrant this contention of the plaintiff. If Bergeron undertook to assist Gray in performing service which it was Gray's duty to perform under Lee's orders, then the jury could find that he (Bergeron) stood in the relation of a fellow servant of Gray while engaged in such service, and that he did not become a temporary servant of the defendant. *Barstow v. Old Colony Railroad*, 143 Mass. 535. *Flynn v. Boston & Maine Railroad*, 204 Mass.

141, 144. See *Berry v. New York Central & Hudson River Railroad*, 202 Mass. 197, 202. The mere fact that Gray, acting under the general instruction of his employer Newell, rendered assistance to Lee, did not constitute him a fellow servant of Lee. *Sprague v. General Electric Co.* 213 Mass. 375, 378. And the jury could find that Gray had implied authority to procure the temporary assistance of Bergeron in the necessary act of moving the car, which the three men present were unable to move, and when no other employees of the defendant or of Newell were available. *Hollidge v. Duncan*, 199 Mass. 121, 123. See L. R. A. 1915 F 1125 note. In responding to the request of Gray, Bergeron was not a mere volunteer or licensee.

The defendant's first, fourth, seventh, ninth, tenth and eleventh requests were denied rightly. The others, so far as applicable to the plaintiff's case as submitted to the jury, were properly covered by the charge.

Exceptions overruled.

ANGELO PEROTTI'S (dependent's) CASE.

Hampden. May 19, 1919. — June 24, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Procedure: deposition; Dependency.

On an appeal to this court from a decree of the Superior Court, made in proceedings under the workmen's compensation act on an appeal by the claimant from a decision of the Industrial Accident Board awarding compensation to the widow of a deceased employee as one partially dependent upon him, the record showed that the widow resided in Italy and was not present at the hearings, that, at the hearing before the single board member, the counsel for the insurer objected "to all witnesses on the ground that the widow is living and the statute provides a means for getting her testimony;" that, at the hearing upon a review of the decision of the single member at the request of the claimant, a motion of the claimant that she be permitted to take depositions of witnesses in Italy was denied, the action on the subject before the single board member being referred to in the record, and that, at the hearing before the Superior Court of an appeal by the claimant, a motion that the case be ordered reopened by the Industrial Accident Board for the purpose of the taking of depositions in Italy was denied. *Held*, that it could not be said that there was any reason to question the action of the single member of the Industrial Accident Board and of the full board in refusing to request the Superior Court, under St. 1911, c. 751, Part III,

§ 3, as amended by St. 1915, c. 275, to issue a commission for the taking of the deposition.

In the case above described, no questions of law were raised at any of the hearings and it was *held*, that the decision of the Industrial Accident Board on the question of dependency, being one of fact, was final.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board, approving findings and a decision of a single member of that board, awarding compensation to Angela Perotti, widow of Angelo Perotti, a deceased employee of a sub-contractor under the act.

The report of the single member of the board disclosed that the widow was not present at the hearing before him, but was represented by an attorney acting under a formal power of attorney; that at the opening of the hearing the counsel for the insurer objected "to all witnesses on the ground that the widow is living and the statute provides a means for getting her testimony."

The single member of the board found and ruled as follows:

"It appears from the evidence that during the year previous to the employee's death resulting from the injury of July 23, 1917, the only money sent home by the employee was \$15 in August, 1916, and \$10 on September 8, 1916, there being no evidence of any further contributions during that year.

"There was evidence that in June, 1916, a dollar was enclosed in a letter and mention made of \$5 sent in a previous letter. One witness testified to having loaned the deceased \$10 some time in the summer of 1916 to send home. This evidence was indefinite and too remote to be considered; therefore, the only money which can be said to have been sent by the deceased to his wife during the year previous to his death is \$25.

"I find that the widow of the deceased was a partial dependent within the meaning of Part II, § 6. As the widow was not living with her husband at the time of death, within the meaning of the statute, this case is decided in accordance with the provisions of Part II, § 7 (c), and the finding made on the facts as they existed at the time of injury and death.

"Under this finding, the widow of the deceased is entitled to a weekly compensation payment of twenty-seven cents (\$.27) for a period of five hundred weeks from the date of injury."

The report of the hearing on review before the full board states:

"The claimant's motion, that she be permitted to take depositions of witnesses residing in Italy and introduce further evidence, is denied. The report of the board member shows that the insurer's counsel objected to proceeding with the hearing, on the ground that the claimant was living in Italy and that her testimony should be taken by deposition, as provided by Part III, § 3, of the act. This objection was overruled by the board member, the evidence heard, and a finding was made based upon all the evidence introduced at the hearing."

The full board affirmed the findings and decision of the single member.

There were no requests for rulings, either before the single member or before the full board.

On appeal to the Superior Court, the claimant filed a motion, containing a recital of facts and seeking that the Industrial Accident Board "be ordered to reopen the case and allow the claimant to take the deposition of witnesses in Italy." There was no affidavit in support of the motion. The case was heard by *King, J.*, who denied the motion and ordered a decree confirming the decree of the board. The claimant appealed.

The case was submitted on briefs.

S. Martinelli, for the claimant.

G. Gleason, for the insurer.

RUGG, C. J. This is an appeal from a decree of the Superior Court entered in accordance with the findings and decision of the Industrial Accident Board, affirming and adopting those of the single member. It is conceded that the employée, a subject of Italy, received fatal injuries in the course and arising out of his employment by a subscriber under the act. This proceeding is brought by his widow, a resident of Italy.

At the hearing before the Industrial Accident Board a motion was made in behalf of the widow that depositions of witnesses be taken in Italy. This was denied. The reasons are not stated, but in that connection it is stated that, at the hearing before the single member, the insurer objected that the testimony of the claimant should be taken by depositions. The single member overruled the objection and proceeded with the hearing. A motion was made in the Superior Court which, although quite informal, is treated

as in substance a motion to recommit to the Industrial Accident Board in order that depositions of witnesses in Italy might be taken.

It is provided by St. 1915, c. 275, amending St. 1911, c. 751, Part III, § 3, as theretofore amended, that "Upon the written request of the board or of any member thereof," filed with the clerk of the Superior Court, commission to take depositions shall issue. The natural inference from the words of this statute is that ordinarily the decision whether such depositions ought to issue or not rests with the board or any member of it. See *Derinza's Case*, 229 Mass. 435, 438. It is not necessary to determine whether under any circumstances an unreasonable refusal by the board to make such request is reviewable. That question is not presented on this record. The claimant, although attention was called to the subject of depositions, chose to go to hearing before the single member without asking for the taking of depositions.

There is nothing on the record except bald denials of the motions for the taking of depositions. The averments in the motions are not evidence, nor can they be taken as true. There is nothing to indicate that there was any real reason in their support or that they were not denied rightly.

The findings of the single member and of the board on review as to the extent of dependency involve no question of law. Manifestly the widow, under the circumstances disclosed, was not entitled to the benefit of the conclusive presumption of dependency established by the act. *Nelson's Case*, 217 Mass. 467. The extent of her dependency upon the wages of the deceased employee was a question of fact. *Gorski's Case*, 227 Mass. 456, 460. No ruling of law appears to have been made and none was requested. The decision of the board is final on questions of fact and not open to revision. *Pass's Case*, 232 Mass. 515, and cases there collected.

Decree affirmed.

BURTON A. PIERCE vs. WORCESTER CONSOLIDATED STREET
RAILWAY COMPANY.

Worcester. May 19, 1919. — June 24, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Street railway.

At the trial of an action against a street railway company for personal injuries received when the plaintiff was run into by an open car of the defendant with running boards along the sides, there was evidence that the accident occurred a half hour after midnight; that just previous to it the plaintiff with others had stood, facing west on the street to the west of the street railway track, which ran north and south; that in front of the plaintiff as he stood was a railroad track, over which there was passing a freight train, for whose passing he was waiting and which was making considerable noise; that the car of the defendant approached from the north at a high rate of speed; that when the car was seven hundred feet from the plaintiff, the conductor in the performance of his duties started along the running board toward the front of the car; that when he arrived at the front, he saw the plaintiff and the others; that he then noticed that the trolley of the car was off, the car then being something more than one hundred feet from the plaintiff; that he said something to the motorman and returned to the rear of the car; that the car proceeded at the same high rate of speed, without lights and with no "whistle, gong, shout or warning of any kind" until the plaintiff was struck with the front end of its right hand running board and injured, and that it then continued two hundred and thirty feet before it was stopped. Something more than thirty-five feet north of where the plaintiff was standing there was, in the track on which the car was approaching, a "flat curve to the left." Rules of the defendant required a reduction in speed of the car so that it would "drift" when approaching sharp curves, and that, when a trolley left the wire, the conductor should "at once signal the motorman to stop, and pull down the trolley." *Held*, that there was evidence of negligence of the conductor which contributed to cause the injury to the plaintiff.

TORT for personal injuries received by the plaintiff when he was struck by a passing electric street car of the defendant. Writ dated December 19, 1916.

In the Superior Court the action was tried before *Fox, J.* The material evidence is described in the opinion. There was evidence of due care of the plaintiff and of negligence of the motorman of the car in question. The defendant asked for a ruling that there was no evidence of negligence on the part of the conductor. The

request was refused. The jury found for the plaintiff in the sum of \$3,100; and the defendant alleged exceptions.

The case was submitted on briefs.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

G. A. Drury & F. A. Walker, for the plaintiff.

CARROLL, J. The plaintiff, while standing on West Boylston Street near New Bond Street in the city of Worcester, waiting for a freight train to cross New Bond Street, was struck by the front end of the right hand running board of one of the defendant's cars and injured. The jury found for the plaintiff. It was not disputed there was evidence for the jury of the plaintiff's due care and of the negligence of the motorman. The defendant asked the court to rule that there was no evidence of the conductor's negligence, the exception to the refusal to grant this request is the only question open on the record.

The jury could have found that the plaintiff, a workman in the night shift of the Norton Company, was returning from lunch about 12:30 A. M.; that he crossed West Boylston Street and stood facing westerly with his hand resting on the northerly side of a twelve inch pole about four feet and three inches from the westerly rail of the defendant's track; that the freight train was proceeding up grade, making considerable noise; that the defendant's car was going in a southerly direction "at a very fast rate of speed;" that one hundred feet north of New Bond Street the trolley came off, the lights went out and were not on until after the plaintiff was injured; that the speed of the car was not lessened before the plaintiff was struck, and when the car was stopped its rear end was two hundred and thirty feet away from the place of the accident; that no "whistle, gong, shout or warning of any kind" was given by the defendant's employees.

From the motorman's evidence it might be found that he saw the plaintiff before he was injured; that the conductor came forward and "said something," (but it did not appear what he said,) and "was just getting up on the platform." The conductor testified that at a point six or seven hundred feet north of New Bond Street he started down the running board to the front of the car to get ready to "run the railroad crossing" south of New Bond Street; that as he was stepping up off the running board, he noticed

the trolley was off and started for the rear of the car to put it on; that he observed the people "standing on the south side of the crossing," when he was "at the front end of the car." There was evidence that thirty-five feet north of New Bond Street there was a "flat curve to the left in the southerly bound track." Rule 313 of the defendant company, "When approaching switches, frogs or sharp curves, power must be shut off 100 feet in advance, speed of car reduced, and car allowed to drift slowly over the same," was in evidence, as well as Rule 357, "Trolley Pole, Leaving Wire, Should the trolley leave the wire, the conductor must at once signal the motorman to stop, and pull down the trolley. After the trolley is fairly on the wire, he must ring two bells for the motorman to start, first looking around and through the car to see if any persons are boarding or leaving same. See that passengers keep their hands off the trolley rope. Trolley Catchers. Conductors are responsible for trolley catchers and retrievers, and must see that same are securely fastened in place. When changing ends they must see that catchers do not slip, so as to cause damage to glass or other part of the car." On these facts, it cannot be said that as matter of law there was no evidence of the conductor's negligence. There was some evidence for the jury to consider, and the defendant's request was refused rightly.

The jury could say that the conductor knew the plaintiff was in a place of danger; that the plaintiff's attention was probably directed toward the passing freight train; that in the absence of light on the street car he might be ignorant of its approach, and the conductor should in some way have warned him of his danger or signalled the motorman to stop the car; especially when he knew the car was moving at a high rate of speed, without lights and when no signal from the gong or whistle was given.

Under Rule 357 the conductor was required at once to signal the motorman to stop; and it could have been found that by failing to give this signal when the trolley left the wire, and by neglecting to connect the trolley with the wire, leaving the car in darkness, he failed to comply with the rule, and that this neglect contributed to the plaintiff's injuries. See *Stevens v. Boston Elevated Railway*, 184 Mass. 476; *Partelow v. Newton & Boston Street Railway*, 196

Mass. 24, 30; *Olund v. Worcester Consolidated Street Railway*, 206 Mass. 544, 546, 547; *Leavitt v. Boston Elevated Railway*, 222 Mass. 346, 347.

Exception overruled.

LYDIA M. STEVENS vs. EBENEZER G. YOUNG.

Essex. January 14, 15, 1919. — June 25, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Way, Private. Deed, Construction, Conveyance by reference to plan. Easement.

At the hearing of a petition for the registration of the title to certain land, the following facts appeared: The owner of a nine acre tract of land caused a plan to be prepared dividing it into forty lots and four ways, called, respectively, C Avenue and W Avenue, which ran east and west, and M Avenue and L Avenue, which ran north and south. He then first conveyed a portion of the tract, described as one tract by metes and bounds, which was bounded by C Avenue and L Avenue and also was referred to by the numbers of the lots on the plan, to a predecessor in title of the petitioner, the deed carrying title to the middle of L Avenue. The next land conveyed from the tract was to the immediate predecessor in title of the respondent, and conveyed, as one tract, a strip of land lying southerly of the strip in which was situated the land previously conveyed, describing it as one solid tract without reference to its lot numbers on the plan. This conveyance included the entire fee of W Avenue and all the remaining lots on both sides of L Avenue, excepting those opposite the lots already conveyed to the petitioner's predecessor in title, and included the fee of L Avenue between the lots included in the deed, and the only reference to L Avenue in the deed was a statement that one boundary line of the land described ran "across land marked L Avenue." Later the petitioner acquired title to the lots opposite those formerly conveyed to him on L Avenue, the grantors conveying, "so far as we are enabled to," a right of way "in common with others . . . in and over the streets and Avenues shown on said plan." In this deed there also were restrictions requiring a set-back of buildings on L Avenue. *Held*, that

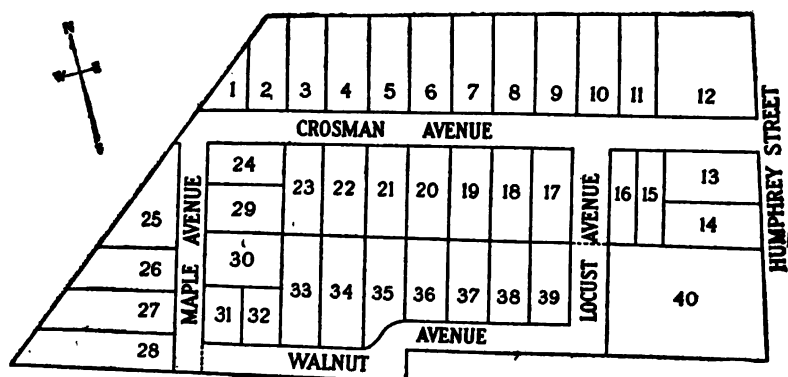
(1) A finding was warranted that, by the second deed from the tract, which was that to the respondent's immediate predecessor in title, the original owner disclosed a purpose not to follow, but to abandon the layout of the plan;

(2) A further finding was warranted that the original owner by the deed to the respondent's predecessor in title intended to convey the fee in W Avenue and in that part of L Avenue included in the solid tract described without giving to the grantee any easement in the rest of L Avenue;

(3) That a decree was warranted registering in the petitioner the unincumbered title to that part of L Avenue which lay between the land on both sides of it owned by him.

PETITION, filed in the Land Court on May 21, 1917, for the registration of the title to certain land in Swampscott, described as one parcel, but roughly shown on the sketch plan, of which a copy is printed below, as lots thirteen to eighteen, inclusive, including that land between lots sixteen and seventeen designated as Locust Avenue.

The respondent, who owned lots thirty to forty, inclusive, including the fee in Walnut Avenue and that land lying between lots thirty-nine and forty and designated Locust Avenue, claimed a



right of way over the part of Locust Avenue between lots sixteen and seventeen.

The petition was heard by *Davis, J.* He found the following facts, in substance:

"The premises in question are situated on the westerly side of Humphrey Street in Swampscott. Humphrey Street is the main road from Lynn to Marblehead. Until comparatively recently the land on the westerly side of Humphrey Street in the neighborhood of that now in question lay in large farm tracts, some of which, however, are in process of suburban development.

"In 1889 one Crosman acquired title to a nine acre tract adjoining the Marblehead town line, and in 1896 had a plan drawn and recorded showing this tract divided into ordinary suburban house lots by four streets. Running westerly from Humphrey Street through the tract the plan shows a street called Crosman Street, leaving a tier of lots of about a third of the width of the whole tract on its northerly side and two tiers of lots on its southerly side. From

the westerly end of Crosman Street, substantially parallel to Humphrey Street, the plan shows a cross street called Maple Avenue, and about a third of the way between Humphrey Street and Maple Avenue, and substantially parallel with them, another street called Locust Avenue. Along the southerly side, connecting Maple Avenue and Locust Avenue, the plan shows a street called Walnut Avenue.

"The first conveyance out of this original tract was made in 1900, when a block of four lots on the southeasterly corner of Humphrey Street and Crosman Avenue running back to and bounding by Locust Avenue was made to predecessors in-title of the petitioner.

"The next conveyance was in 1906 to the immediate predecessors in title of the respondent, from whom he purchased in 1907. This deed conveyed the southerly portion of the original tract between Humphrey Street and Maple Avenue. It is carefully described by reference to the recorded plan, but is described as a solid tract without any reference to its lot numbers on that plan. The description begins on the southeasterly side of Maple Avenue at a given distance southerly from its junction with Crosman Avenue, and thence runs easterly to Humphrey Street, bounding northerly in a straight line by other land of the grantor, the land conveyed in 1900 to the predecessors of the petitioner, and 'across land marked Locust Avenue on said plan,' thence southerly by Humphrey Street to land of Rowe, thence westerly by the Rowe land to Maple Avenue, and thence northerly by Maple Avenue to the point of beginning. There is no reference other than that above quoted to Locust Avenue. Walnut Avenue, which on the plan lies entirely within the lot thus described along its southerly side between Maple and Locust Avenues, is not mentioned. At the end of the particular description is a recital that it is that part of the original tract 'which lies southeasterly of said Maple Ave. and southwesterly of a straight line from said Humphrey Street to said Maple Avenue which is the southwesterly boundary of lots numbered' fourteen to twenty-three inclusive and twenty-nine on the recorded plan. Then follows the clause, 'together with the right to use said Maple and Crosman Avenues, as shown on said plan for street purposes in common with others.' It is under this deed that the respondent claims rights of way, across

land now of the petitioner, in Locust Avenue as shown on the plan. . . .

"The deed in question, except for the deed of 1900 to the predecessors of the petitioner, was the first one made with reference to the recorded plan. No one except the petitioner's predecessor had acquired any previous rights in regard to it. . . . It seems to me clear that by this deed the plan was materially changed by the elimination of Walnut Avenue and the 'land marked Locust Avenue' on said plan, and that the grant of rights of way over Maple Avenue and Crosman Street specifically limited the rights of way granted as appurtenant to the premises of the respondent thereby conveyed. . . .

"In April, 1912, all of the remaining lots were conveyed by reference to said plan, the lots on the westerly side of Locust Avenue opposite those conveyed in 1900 being described as bounding easterly on Locust Avenue. This deed of 1912 contains the clause, 'together with a right of way in and over the streets or avenues shown on said plan as if the same were public highways.' Of the lots so conveyed the petitioner in May, 1912, acquired lots number seventeen and number eighteen, on the southeasterly corner of Crosman Street and Locust Avenue, described as bounding easterly by Locust Avenue. This deed contains the clause, 'together with a right of way in common with others, so far as we are enabled to grant the same, in and over the streets and avenues shown on said plan as if the same were public highways.' The two lots thus conveyed were also made subject to certain restrictions, among them that 'no part of any building shall be erected or placed within fifteen feet of the line of said Crosman or Locust Avenues.' . . .

"The respondent, since he acquired his land in 1907, has used the location of Locust Avenue 'as shown on the original recorded plan, and this, because of the topography, affords the most convenient and practical way of access to his rear land. This use has not, however, ripened into an easement by prescription."

The judge ordered a decree for the petitioner; and the respondent alleged exceptions.

S. Parsons, for the respondent.

J. M. O'Donoghue, for the petitioner.

BRALEY, J. It appears that Samuel F. Crosman, having acquired the ownership of nine acres of land, caused a plan to be prepared dividing the tract into lots numbered consecutively from one to forty with proposed avenues or streets which connected with Humphrey Street, a public way. The plan was recorded in the registry of deeds, and by mesne conveyances the petitioner has become the owner of lots thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, while the respondent Young owns lots numbered thirty to forty inclusive.

By the first deed in 1900 Crosman conveyed to one Entwistle, the petitioner's predecessor in title, lots thirteen, fourteen, fifteen and sixteen. The exact wording of the grant does not appear. We assume on the record that the description in the deed to the petitioner is the same as in the deed of Crosman to Entwistle. The premises are described by metes and bounds as one indivisible tract, giving the northwesterly boundary as "Locust Street or Avenue so called," after which follow the words, "Being lots thirteen, fourteen, fifteen and sixteen on a plan of land drawn for Samuel F. Crosman . . . and recorded with Essex county (South District) Deeds book 1468 page 600."

By deed dated August 26, 1907, the respondent Young acquired title from one Linnehan, to whom the land had been conveyed on November 21, 1906. This deed also described the premises as one parcel, beginning "at the most Westerly corner thereof at the point in the Northeasterly boundary line of land . . . where the Southeasterly side line of Maple Avenue, as shown on a plan of lots owned by S. F. Crosman . . . and recorded . . . would intersect said boundary line if continued in a straight line . . .," and after giving the courses and distances the description is followed by this sentence, "Together with the right to use said Maple Avenue and Crosman Avenue, as shown on said plan, for street purposes in common with others."

The petitioner on May 22, 1912, gained title to lots seventeen and eighteen under a deed which describes the parcel as bounded "Northeasterly by Crosman Avenue, one hundred twenty feet; Southeasterly by Locust Avenue, one hundred thirty five and 75/100 feet; Southwesterly by lots 38 and 39 on a plan of land hereinafter mentioned, one hundred twenty feet, and Northwesterly by lot No. 19 on said plan, one hundred thirty five and

75/100 feet; being lots numbered 17 and 18 on a plan of this and other lots, . . . together with a right of way in common with others so far as we are enabled to grant the same, in and over the streets and Avenues shown on said plan as if the same were public highways. . . . Said premises are conveyed subject to the following restrictions which shall remain in force for twenty years from the date hereof, viz.: 'No building shall be erected or placed on either of said lots costing less than Three thousand dollars. Said premises shall be used for a dwelling only. No three tenement house or a house to be occupied by three families or any house known as a three tenement flat roof house shall be erected or placed on the granted premises and no part of any building shall be erected or placed within fifteen feet of the line of said Crosman or Locust Avenue, except that steps may extend within said restricted space.'"

While the description in the petition for registration consolidates the descriptions as if lots thirteen, fourteen, fifteen, sixteen, seventeen and eighteen constituted an entire tract which never had been divided as shown by the plan, the petitioner, who claims under Samuel F. Crosman, being bound by the recitals in her deeds, is estopped on her own title from contending, that so much of Locust Avenue as lies within the description of the deed of May 22, 1912, has been extinguished as to other lot owners who have acquired appurtenant rights to use the avenue. *Downey v. H. P. Hood & Sons*, 203 Mass. 4, 10, and cases there cited. But this well settled rule, where the sale is by a plan which by reference is incorporated in the grant, does not control when it appears from the deed and the attendant circumstances, that the parties did not impliedly intend the grant to include all of the proposed ways. *Attorney General v. Whitney*, 137 Mass. 450, 455. The description in the deed under which the respondent claims undoubtedly conveys, as if they were one parcel, not only lots thirty and forty, but also the fee in Walnut Avenue and in the westerly half of Locust Avenue. The fee having passed, the respondent, subject to the prior rights, if any, of other lot owners, could use those proposed ways for the benefit of his own estate as he might determine. The land, however, is conveyed as stated in the decision of the trial court, "as a solid tract without any reference to the lot numbers on that plan," the nor-

therly boundary being described as "running across land marked Locust Avenue." And immediately following the description and constituting part of the grant are the words previously quoted, "Together with the right to use said Maple and Crosman Avenues, as shown on said plan for street purposes in common with others." It is true, but quite beside the point, that no change appears of record in the plan as originally drafted. The parties, of course, could enter into any bargain they wished to make. The evidence warranted a finding that the purpose of this conveyance was not to follow but to abandon the layout of the plan and the purchase could be made under terms which, while passing the fee in Walnut Avenue and that part of Locust Avenue between lots thirty and forty leading into Walnut Avenue, conferred no easement in the remainder of Locust Avenue. The intention of the parties in so far as consistent with legal rules of construction governs. *Bott v. Burnell*, 11 Mass. 162, 167. *Allen v. Holton*, 20 Pick. 458. *Hobart v. Towle*, 220 Mass. 293. *Coolidge v. Dexter*, 129 Mass. 167. *Taft v. Emery*, 174 Mass. 332, 334.

We are accordingly of opinion that the judge correctly ruled that the respondent's grant included only Maple and Crosman Avenues, and that he had acquired no right of passage in or over Locust Avenue from his easterly line to Crosman Avenue. *Light v. Goddard*, 11 Allen, 5, 8. *Regan v. Boston Gas Light Co.* 137 Mass. 37. *Pearson v. Allen*, 151 Mass. 79.

Exceptions overruled.

MATTHEW E. CARDOZA & another vs. FRANK LEVERONI,
administrator.

Suffolk. January 15, 1919. — June 25, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Gift. Mortgage, Of real estate: discharge. *Trust*, What constitutes.

A gratuitous promise to discharge a debt evidenced by a note secured by a mortgage of real estate, not accompanied by the redelivery of the note or mortgage or by the execution or delivery of any instrument to carry out the promise, does not extinguish the debt nor, after the death of the mortgagee, give to the mortgagor

a right to maintain a suit in equity to enjoin the foreclosure of the mortgage by the administrator of his estate.

Although no particular form of words is necessary to create by declaration a trust in a note secured by a mortgage of real estate, a mere executory purpose to do so is not enough.

An imperfect gift cannot be interpreted to be a declaration of trust.

Where the owner of a note secured by a mortgage of the maker's real estate, while the note and mortgage were in the possession of an agent of the owner together with a signed but unacknowledged and unrecorded assignment of them by the mortgagee to the agent, made statements to the mortgagor which plainly showed that he considered that the mortgagor had paid enough on the debt, that he considered the mortgage paid and that he intended to make a transfer of the title in the future by discharging it, but died without having done so, such facts are not sufficient to show a complete declaration of a trust of the note for the benefit of the mortgagor.

BILL IN EQUITY, filed in the Superior Court on August 9, 1917, alleging that the defendant, as administrator of the estate of one Mary De Castro, was in possession of a mortgage upon certain real estate owned by the plaintiffs, which he intended to foreclose, contending that there was a balance due thereon; that the defendant's intestate previous to her death had made a gift to the plaintiffs of the balance due on the mortgage. The prayers of the bill were that the defendant be restrained from foreclosing the mortgage and be ordered to execute and deliver a discharge of it.

The suit was referred to a master. Material findings of the master are described in the opinion. The suit was heard upon the pleadings and the master's report by *Jenney, J.*, who ordered the report confirmed and the bill dismissed with costs. The plaintiffs appealed.

W. H. Lewis, (*I. H. Fox* with him,) for the plaintiffs.

S. L. Bailen, (*F. Leveroni* with him,) for the defendant.

CARROLL, J. The defendant's intestate, Mary De Castro, was the owner of a mortgage on the real estate of the complainant, Matthew E. Cardoza. The bill alleges that she made a gift to the plaintiff "of the balance then remaining unpaid on the said mortgage." The plaintiffs seek to restrain the defendant from foreclosing this mortgage, which matured three years after its date, and while held by Miss De Castro was twice renewed. The mortgagor paid the interest to Mary Cass, an agent of the mortgagee, and made the last interest payment on October 14, 1914. On this date Cardoza delivered to Miss De Castro a policy of insurance in the sum of \$3,000, payable to the mortgagee as her

interest may appear. On the following day Miss De Castro signed and delivered to Miss Cass an assignment of the mortgage, which never was acknowledged or recorded, and an order on the Cardozas to pay her the interest and principal of the mortgage when due. The order and assignment were executed solely for the purpose of authorizing Miss Cass to collect the interest or principal which Miss De Castro might demand of the mortgagor.

The master found that when these instruments were signed Miss De-Castro was "undecided as to whether or not she would ask the Cardozas to pay anything further toward the balance then remaining due on the mortgage, but felt that they should pay at least \$500 in order to entitle them to a release from all further obligation thereunder, and so expressed herself to Miss Cass;" that in November of the same year, when Miss Cass asked Miss De Castro what, if anything, she was to do with the Cardoza mortgage, Miss De Castro "replied by the single word, 'Wait';" that after the papers were signed, Miss De Castro began to regret her action and to distrust Miss Cass; that she became hostile to her and this hostility lasted until the death of Miss De Castro, although "Miss Cass at no time did anything to justify the attitude which Miss De Castro adopted toward her."

As soon as Miss De Castro began to distrust Miss Cass she decided to make a gift of the mortgage to the Cardozas. On or about October 21, 1914, she told them "that she was not going to renew the mortgage which was then overdue because they had paid enough; she also informed them that at her last interview with Mary Cass she had told her that it was no more than right to leave the mortgage to the Cardozas." In March, 1915, Cardoza told Miss De Castro that interest would be due the following April, to which she replied, "I told you the last time I was here that I was going to discharge the mortgage to you because I considered that mortgage paid by you, that you had paid enough, and don't you go down to Mary Cass to pay any money at all." Subsequently, on one or two occasions, she said she considered the mortgage paid and intended to give it to the Cardozas. A few days before she died, in February, 1917, she requested Cardoza to call and see her on a matter of business and expressed much displeasure at his failure to respond. No interest was paid or demanded after October 14, 1914. The master found that Miss

De Castro considered the mortgage paid and intended to deliver the note and mortgage to the plaintiffs; but that no delivery or assignment of the mortgage was made, the mortgage remained undischarged of record, the note and mortgage were in the possession of Miss Cass until the death of Miss De Castro, and no request was made to deliver them.

From the master's findings it is clear that Miss De Castro intended to absolve the Cardozas from further payment and to make a gift to them of the note and mortgage; but this intent was never carried out. The gift was not perfected. The note remained in the possession of her agent and there was no delivery of the instruments: her purpose was never executed. There was no consideration to support the parol promise to make the gift; and words alone, without a delivery, are insufficient to complete it. The contemplated gift to the Cardozas rested in the intention of Miss De Castro to transfer the title in the future. "An intent to give is not a gift; nor is an executory agreement or promise without consideration a gift." *Gerry v. Howe*, 130 Mass. 350. *Grover v. Grover*, 24 Pick. 261. *Buswell v. Fuller*, 156 Mass. 309. *Duryea v. Harvey*, 183 Mass. 429. A gratuitous promise to discharge a debt does not extinguish it. Although the intestate intended to discharge the debt, her intention never became effective. See *Weber v. Couch*, 134 Mass. 26; *Smith v. Johnson*, 224 Mass. 50.

Nor were the acts and statements of Miss De Castro sufficient to create a trust, by constituting herself a trustee of her own property for the benefit of the Cardozas. While the language and acts indicated an intention to bestow a gift on the Cardozas, there is nothing in the evidence or findings of the master to show that she clearly manifested a desire to hold the note and mortgage in trust for them. Even if such a plan were contemplated, it was never executed or fully declared. Although no particular form of words is necessary to create a trust, a mere executory purpose is not enough. There must be a complete intention, shown and expressed with sufficient clearness. See *Supple v. Suffolk Savings Bank*, 198 Mass. 393. The statements of Miss De Castro indicate either that she considered the mortgage paid, or that she contemplated a transfer of the title in the future by discharging the mortgage or by making a gift to the Cardozas. Her declara-

tions that Cardoza had paid enough and that she considered the mortgage paid are insufficient to establish a trust; and if she contemplated the making of a gift in the future, a trust does not arise from this circumstance; for an imperfect gift cannot be converted into a declaration of trust. In the case of a voluntary disposition of property the settlor must complete the transfer in order to make it binding upon him; and if it is intended that the settlement is to be perfected as a gift, the court will not make it operative as a trust. "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." *Milroy v. Lord*, 4 DeG., F. & J. 264, 274. *Welch v. Henshaw*, 170 Mass. 409.

We find nothing in the Massachusetts cases cited by the plaintiffs contrary to what is here decided. If anything is to be found in the decided cases of other jurisdictions, in conflict with the well settled law of this Commonwealth which governs the case at bar, we must decline to follow them.

It follows that, as there was no perfected gift, nor a sufficient declaration of trust, the plaintiffs cannot prevail.

Decree affirmed.

PRATT AND FORREST COMPANY vs. STRAND REALTY COMPANY OF
LOWELL & others.

ERWIN A. WILSON & another vs. SAME.

Middlesex. March 13, 1919. — June 25, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Mechanic's Lien, Notice of contract. Estoppel.

Under St. 1915, c. 292, § 2, amended by St. 1916, c. 306, § 1, where it is sought, either by a principal contractor or by a subcontractor, to maintain a mechanic's lien for labor and material performed or furnished under or by virtue of a written contract, there must be filed in the registry of deeds for the county or district where the land is located, by some person entitled to maintain the lien, a notice in writing stating among other matters the date when the contract is to be completed.

A general contractor made with the owner of real estate a contract in writing to

erect a building upon his land, which contained a provision that the contractor should complete the several portions and the whole of the work by March 15, 1917, the time of completion being expressly stipulated to be the essence of the contract. There were further provisions for liquidated damages in case of delay in performance and for a bonus for earlier performance. There also were provisions for a determination by architects of the number of working days beyond March 15 to which the contractor might be entitled under certain provisions of the contract and for extensions of the time for performance under certain conditions, "but in no event shall the same be extended beyond April 1, 1917." The contractor filed in the registry of deeds of the district where the land was situated a notice of the contract, otherwise sufficient, in which it was stated, "Said contract is to be completed on or before April 1, 1917." At the hearing of bills in equity by subcontractors under the general contractor to enforce alleged mechanic's liens under St. 1915, c. 292; St. 1916, c. 306, there was no evidence tending to show that at any time the architects made any determination as to the number of working days to which the contractor was entitled beyond March 15, nor of any extension of the time of performance. *Held*, that the notice stating April 1 as the date on which the contract was to be completed was not a compliance with the statute, and that the suits must be dismissed for that reason.

TWO BILLS IN EQUITY, filed in the Superior Court on January 11, 1918, and November 28, 1917, respectively, under St. 1915, c. 292, § 4, as amended by St. 1916, c. 306, § 3, to enforce mechanics' liens upon the interest of the Strand Realty Company in certain real estate in Lowell in favor of the plaintiffs, who were subcontractors under A. B. Beal Construction Company, a corporation, the assignee from A. B. Beal of the general contract for the erection of the building for the Strand Theatre Company, described in the opinion. The debt alleged to be due to the first plaintiff was \$5,580.94, and that alleged to be due to the second plaintiff was \$1,252.74.

The suits were consolidated, and issues were referred to a jury for trial to determine whether a "statement" was filed by each plaintiff "within thirty days after the date on which the principal contract was to be performed under any extension thereof." These issues were tried before *J. F. Brown, J.*

The material evidence is described in the opinion. At the close of the evidence, the judge ordered the jury to answer the issues in the negative and reserved and reported the cases, with all the evidence, for determination by this court.

A. S. Howard & M. G. Rogers, for the plaintiffs.

D. Stoneman & C. S. Hill, for the defendant Strand Realty Company of Lowell.

RUGG, C. J. These are suits in equity to enforce a lien upon the interest of the Strand Realty Company in land in Lowell, brought under St. 1915, c. 292, § 4, as amended by St. 1916, c. 306, § 3. These statutes make a radical change in the law of mechanics' and other liens upon real estate. Section 1 of the new statute gives a lien to those who labor. The subsequent sections relate more particularly to contractors and subcontractors who furnish either labor or material or both.

It is provided by St. 1915, c. 292, § 2, as amended by St. 1916, c. 306, § 1, that any person who has entered into a written contract with the owner for the erection, alteration, repair or removal of a building upon land, or for furnishing material therefor, or who has made a subcontract respecting the same and who therefore is entitled to enforce a lien under the act, may file in the registry of deeds for the county or district where the land lies, a notice giving the date of the contract between the owner and the contractor, a description of the land, a brief statement of what is to be done under the contract, and the date on or before which "said contract is to be completed." A further provision is that "A notice of any extension of said contract, stating the date to which it is extended, shall also be filed or recorded in the registry prior to the date stated in the notice of a contract for the completion thereof." By § 3 as amended by St. 1916, c. 306, § 2, it is provided that after the required notice has been filed or recorded, any person who subsequently shall "furnish labor or material, or perform labor, under a contract with a contractor or" subcontractor, may enforce a lien therefor on the premises "for any labor performed, or labor or material furnished, subsequent to the filing or recording of said notice and prior to the date of the termination of said contract as stated in said notice or notices." By § 7 of said c. 292 "The lien provided for by section two and . . . by section three shall be dissolved unless the contractor, or some person claiming by, through or under him, shall, within thirty days after the date on which the principal contract is to be performed" file a statement of his account. It is provided by § 8 that the lien also shall be dissolved unless a bill in equity to enforce it is filed within sixty days after the filing of the statement, thus referring also to the date for the completion of the principal contract. On the back of the bond to prevent the attachment of a

lien for labor, and standing in place of the lien as security, as set forth in § 9, must appear a certificate signed by the principal on the bond, giving, together with other information, the date on which the work under the principal contract is to be completed.

It is manifest from these provisions of the statute that the date of the completion of the principal contract, at all events so far as fixed by its terms, must be stated in the notice and is an essential part of it. It is provided in § 8 of said c. 292 that "The validity of the lien shall not be affected by an inaccuracy in the description of the property to which it attaches, if the description is sufficient to identify the property, or by an inaccuracy in stating the amount due for labor or materials, unless it is shown that the person filing the statement has wilfully and knowingly claimed more than is due to him." There is no such provision respecting inaccuracy in stating the date for the completion of the principal contract.

Sections 2 and 3 of the act relate to written contracts alone. It is matter of common knowledge that such contracts commonly fix the date for their completion.

The irresistible effect of all these provisions is that substantial accuracy in the statement of the date fixed by the principal contract for the completion of the work to be performed under it is essential to a valid notice. This results inevitably from the absolute requirement for the statement of such date in the notice, from the fact that that date is the point of time from which run the several statutory limitations of the act, and from the provision that certain inaccuracies, among which a mistake in this date is not included, shall not affect the validity of the lien.

This conclusion is confirmed by comparison of the pre-existing state of the law as to liens with the changes wrought by said c. 292. Under the previous lien law, there was no provision whereby the record in the registry of deeds disclosed before or at the time of the attachment of a lien the existence of a lien or the fact that one might be claimed. There was no requirement for the record of any facts respecting a building contract, or any information as to its date, or the beginning or ending of work under it before the lien should come into existence. One plain object of the present statute was to require the placing upon record in the registry of deeds of certain information, for the benefit of prospec-

tive purchasers of land and other interested persons, touching the incumbrances created or likely to be created by liens, including the time limit within which the furnishing of material and labor under written contracts must be performed. Accuracy in this respect may be thought to be essential for the protection of laborers and subcontractors as well as others who may have occasion to depend upon the record. Whatever may have been the reason of the statute, its terms are clear and are not open to misapprehension as to their meaning.

A lien upon real estate for labor or material performed and furnished thereon is wholly the creature of statute. No such lien exists except as provided by statute. The terms of the statute must be followed in order that such lien may be established.

In analogous cases compliance with the statutory requirement for notice has been held to be a condition precedent to the existence of a cause of action. For example, injuries caused by snow or ice, *Baird v. Baptist Society*, 208 Mass. 29, *O'Neil v. Squire*, 230 Mass. 294, injuries caused by defects in highways, *Nash v. South Hadley*, 145 Mass. 105, *Driscoll v. Fall River*, 163 Mass. 105, *Goodwin v. Fall River*, 228 Mass. 529, injuries within the scope of the employers' liability act, *Grebenstein v. Stone & Webster Engineering Co.* 209 Mass. 196, *Harding v. Lynn & Boston Railroad*, 172 Mass. 415. See also in this connection, as to requirement for written notice of filing exceptions, *Chertok v. Dix*, 222 Mass. 226, and of entry of appeal from decree of Probate Court, *O'Neill v. O'Neill*, 229 Mass. 508. In the absence of some provision saving the validity of imperfect notices, there must be compliance with the specified requisites. *Bowes v. Boston*, 155 Mass. 344. *Hatch v. United States Casualty Co.* 197 Mass. 101. *Boruszewski v. Middlesex Mutual Assurance Co.* 186 Mass. 589.

The result is that where it is sought to maintain a lien under the present statutes for labor and material performed or furnished under or by virtue of a written contract, either by a principal contractor or by a subcontractor, there must be filed in the registry of deeds for the county or district where the land is located, by some person entitled to maintain the lien, a written notice stating amongst other matters the date when the contract is to be completed.

The relevant facts in the case at bar are that the Strand Realty Company entered into a contract in writing under date of September 27, 1916, with Abraham B. Beal, whereby the latter, called the contractor, agreed to erect a building upon its land. That contract contained a provision in these words: "The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: the fifteenth day of March, nineteen hundred and seventeen. It is understood and agreed that the time of completion of work comprehended in this contract is the essence of this agreement." After a clause requiring the payment of liquidated damages to the Strand Realty Company by the contractor for delay after March 15, 1917, and of bonus by the Strand Realty Company to the contractor for completing the work before that day, follow these words: "except that in the event the Contractor shall be entitled to One Hundred Eight (108) full working days for the completion of the entire building in accordance with the specifications hereinbefore referred to, Saturday not being figured as a working day; and if the said Contractor does not have said number of days, he shall be entitled to such extension beyond March 15th, 1917, as shall give him his said number of days as above provided; but in no event shall the same be extended beyond April 1, 1917; in which case said penalty shall only apply to such time as shall extend beyond said aforesaid number of days, including duly authorized extensions. What shall constitute a full working day shall be determined by the Architects herein named, whose decision shall be final. No fraction of less than half a day shall be considered in determining the time to which the said Contractor is entitled for said work. The contractor is to make a daily report to the Architects as to whether the preceding day was a full working day or not, and if any question arises as to whether any day should be considered as a suitable working day, or if the contractor fails to make his daily report, the Architects are to be the sole judges as to whether the day in question should be considered as a full working day or not."

On October 19, 1916, the contractor filed a notice, otherwise sufficient, in which it was stated, "Said Contract is to be com-

pleted on or before April 1, 1917." The plaintiffs are subcontractors under the original contract with Beal. They depend for the validity of their liens upon the sufficiency of this notice filed by the contractor. There was no evidence tending to show that at any time the architects made any determination oral or written as to the number of working days beyond March 15, 1917, to which the contractor was entitled, within which to complete the contract. It is expressly stated in the report that there was never any written extension of the contract and no express oral extension to any date certain. Upon these facts the notice stating April 1, 1917, as the date on which the contract was to be completed, was not a compliance with the statute. The date was fixed by the written contract with perfect clearness to be March 15, 1917. There might be extension beyond that date in accordance with the terms of the contract until a time not later than April 1, but that extension could be made only upon the conditions therein set forth with which there was no compliance. There is no evidence that when the notice was recorded on October 19, 1916, anything had occurred to warrant the conclusion that there would be any ground for extension of the time for the completion of the contract to April 1. No such extension then had been granted expressly or impliedly. Whether any such extension would be given or agreed upon or equitably required was then wholly prophetic. There was no foundation whatever for the notion that April 1, 1917, was the date, except that it was the latest date on which the contract by any possibility could be completed under its terms as written. It was not the date fixed by the contract, and April 1 as a date for completion could only become operative by the occurrence of subsequent events.

The incorrect statement of the date for the completion of the contract was fatal to the creation of the lien. Hence cases like *Rockwood v. Walcott*, 3 Allen, 458, 462, are not in point.

It may be that cases may arise where the landowner may be estopped to deny an extension of time. But here the initial or original notice was fatally defective. The landowner does not appear upon this record to have misled by words, silence or conduct either of the plaintiffs upon that point. Acceptance of material by the landowner after the original contractor had become in-

capable of completing the contract and long after March 15, whatever other effect it may have, is not an estoppel to object to the sufficiency of the original notice recorded long before that time. The principle, upon which *D'Almeida v. Boston & Maine Railroad*, 224 Mass. 452, and the numerous cases there cited was decided, does not aid the plaintiffs upon these facts.

This appears to be a hard case. We can, however, only interpret and apply the statute as we find it. We cannot recast it. Let the entry be in each case

Bill dismissed without costs.

BENJAMIN KIMBALL vs. HARRIET A. WHITNEY.

SAME vs. MARY E. BATES.

Suffolk. March 14, 1919.— June 25, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Trust, Investments by trustee. Massachusetts Electric Companies.

A trustee under a will, which, as to the trust funds, directs him to "keep the same safely and profitably invested in real or personal property, mortgage notes, bonds, stock or any such other conservative investments as in his discretion he may approve," is bound, as to investments, only to conduct himself faithfully and to exercise a sound discretion: to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested.

A trustee under the will above described invested trust funds in thirty so called preferred shares of the "Massachusetts Electric Companies" in 1903 and retained them until 1917, when he filed his first account. Upon a hearing, on an appeal from a decree of the Probate Court allowing an account which included such investment, the following facts appeared: "Massachusetts Electric Companies" was the business title of trustees under an agreement and declaration of trust under the provisions of which there was placed in the hands of the trustees a large and controlling majority of the capital stock of thirty-six street railway and electric light corporations in Massachusetts, Rhode Island and New Hampshire, operating mainly in Massachusetts, the business of the trustees being the holding of the stock of the subsidiaries and the supervising of their management by means of stock control and assisting in their financing. The trustees issued to the original subscribers to the agreement and declaration of trust negotiable certificates of "preferred" and "common" shares of the par value of \$100 each, and it was provided that they should

not issue more shares, except that, upon vote of two thirds of the shareholders, further shares might be issued for the acquiring of further property for the trust. The trustees were elected by the shareholders from time to time and were given exclusive power to manage and control the properties in their hands, holding the shareholders harmless for their acts to the extent of the property of the trust but not personally, and not being liable for acts done in good faith or for errors of judgment or acts of their agents. The trustees were given no power to bind the shareholders personally, and all their contracts were so to stipulate. At the termination of the trust, the property was to be liquidated and divided among the shareholders, priority being given to the holders of preferred shares. The holders of preferred shares were entitled to a cumulative semiannual dividend at the rate of four per cent. In making the investment in question, the trustee acted in good faith. Previous thereto a large number of trustees in Massachusetts had invested in shares of the same security and were retaining their investments. Before investing, the trustee made reasonable inquiry among bankers and brokers and received favorable opinions of the investment. He paid \$38.75 per share. Regular dividends on the shares at the rate of four per cent were paid to and including July 1, 1904; no more were paid until January 1, 1909; after July 1, 1910, and up to July 1, 1917, dividends averaged two per cent per annum, an issue of a seventeen and three quarters per cent dividend being made in new preferred stock in 1912 to satisfy accumulated dividends. The market value of the shares fluctuated widely after 1911, never was equal to the price at which the trustee purchased, and in August, 1917, was not higher than \$25 per share. It was agreed that, "except in so far as the propriety of retaining the investment was affected by the character of the organization in contemplation of law, there was nothing in the future outlook of the Massachusetts Electric Companies and its subsidiaries which required the trustee as a matter of sound discretion to dispose of the shares." Upon a report and reservation by a single justice of the questions, whether the organization of the Massachusetts Electric Companies was such that the investment was proper as a matter of law or whether, if the original investment was proper, its retention was improper, it was *held*, that

(1) The reservation required a determination of the question, whether a finding that such investment was proper as a matter of fact must be pronounced wrong as matter of law;

(2) It could not be said that, at the time of the investment, it was improper and unwarranted as matter of law;

(3) It was not necessary to determine whether the agreement and declaration of trust constituted a partnership among the shareholders, or a trust;

(4) Assuming, without deciding, that a partnership among the shareholders was constituted by the agreement and declaration of trust, it was not a commercial or trading partnership, but a partnership of a peculiar kind, and its character did not as matter of law render the investment unwarranted;

(5) The facts showed that good faith and sound discretion were exercised in making the investment (following *Harvard College v. Amory*, 9 Pick. 446);

(6) The retention of the shares until August, 1917, could not be held as a matter of law to be unwarranted.

TWO APPEALS by beneficiaries under a trust created by the will of Mary Bates, late of Boston, from a decree of the Probate Court

of the county of Suffolk allowing, with some amendments not material to this decision, the first account of the trustee, covering a period from March 6, 1892, to July 1, 1917.

Such of the objections of the appellants as are material to this decision were as follows:

"(1) That the court approved and allowed an investment in thirty shares of preferred stock of the Massachusetts Electric Companies, . . . which shares this appellant alleges were not a proper security for investment of the trust fund or of any part thereof.

"(2) That the court approved and allowed the retention of said shares by the trustee, [which still were in his hands when the account was filed] . . . , whereas this appellant alleges that the trustee had opportunities to dispose of said shares without loss, and that it was his duty to sell and dispose of the same."

The appeals were consolidated and were heard together by *De Courcy, J.*, upon an agreed statement of facts.

The provision of the will of Mary Bates as to the investment of trust funds by the trustee was, "To keep the same safely and profitably invested in real or personal property, mortgage notes, bonds, stock or any such other conservative investments as in his discretion he may approve."

The thirty "preferred" shares of the Massachusetts Electric Companies in question were purchased by the trustee at \$88.75 per share.

It appeared that the "Massachusetts Electric Companies" was formed by an agreement and declaration of trust whereby certain firms, designated "subscribers," who owned "certain shares of the capital stock and other securities of sundry street railway and other companies and contracts to purchase the same and also other property," conveyed the same to certain individuals as trustees, under the designation of "Massachusetts Electric Companies," the trustees issuing therefor negotiable certificates for two hundred and forty thousand shares of the par value of \$100, of which one hundred and twenty thousand were designated preferred and one hundred and twenty thousand were designated common. Material provisions of the trust were as follows:

"Second. . . . The shareholders shall, at each annual meeting,

or adjournment thereof, elect five Trustees to serve for the term of three years next ensuing. In case of the death, resignation, or inability to act of any of said Trustees, the remaining Trustees shall accept any resignation and fill any vacancy for the unexpired term. As soon as any Trustees elected by the shareholders or by the remaining Trustees to fill a vacancy have accepted this trust, the trust estate shall vest in the new Trustees or Trustee, together with the continuing Trustees, without any further act or conveyance.

"Third. The Trustees shall hold the legal title to all property at any time belonging to this trust, and shall have and exercise the exclusive management and control of the same; they shall assume all contracts for and obligations and liabilities in connection with or growing out of the purchase of the stock or securities assigned to them by the Subscribers and mentioned in the annexed schedule, and to the extent and value of such stock and securities but not personally shall agree to hold the Subscribers and any person associated or acting with them harmless and indemnified from and against any loss, cost, expense, or liability upon, by reason of, or in connection with, any such contract, obligation, or liability; they may adopt and use a common seal; they shall have power to vote in person or by proxy upon all shares of stock at any time belonging to the trust, and to collect, receive, and receipt for the dividends thereon, and may contract with each or any of the controlled companies in respect of any matter or matters relating to the operation of the road or the conduct of the business of any such company or companies; to collect, sue for, receive, and receipt for all sums of money at any time coming due to said trust; to employ counsel; to begin, prosecute, defend, and settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust; they may also, with the consent of not less than ten of their number given at a meeting called for that purpose, but not otherwise, exchange, upon such terms as may be agreed upon, the stock or securities held by them in any corporation for the stock or securities of any other corporation taking over the property of such corporation by consolidation or otherwise; and with such consent but not otherwise, may loan money to any corporations of which they may own a majority of the capital stock,

and may subscribe for or acquire additional stock or the securities or obligations of such corporations; and, with such consent but not otherwise, may subscribe for, purchase, and acquire shares in the capital stock or the securities of any corporations (1) owning or operating railways or railroads, or engaged in the business of transporting merchandise, mails, or express matter, or (2) engaged in whole or in part in supplying light, heat, power, or other public service, or (3) manufacturing, selling, or repairing machines, equipments, supplies, or other articles used by corporations of either or both of the classes above named, or (4) engaged in the business of insuring corporations of any or all of the foregoing classes against loss by fire or casualty, or (5) engaged in the business of advertising in the cars or upon the premises of railway or railroad companies; and with such consent but not otherwise, may borrow money for any of the purposes aforesaid. With the consent of the holders of at least two-thirds of each class of shares outstanding given at a meeting called for that purpose, but not otherwise, except as herein otherwise provided, the Trustees may sell, mortgage, pledge, encumber, or dispose of any shares of stock, securities, or other property from time to time held by them upon such terms and for such purposes as the shareholders at such meeting may approve. . . .

"Fourth. . . . The Trustees may make, adopt, amend, or repeal such by-laws, rules, and regulations, not inconsistent with the terms of this instrument, as they may deem necessary or desirable for the conduct of their business and for the government of themselves and their agents, servants and representatives.

"Fifth. The Trustees shall annually elect from among their number a President and a Vice-President of the Board, and shall also annually elect a Treasurer and a Secretary, and they shall have authority to appoint such other officers, agents, and attorneys as they may from time to time deem necessary or expedient for the conduct of their business. . . . The Trustees shall fix the compensation, if any, of all officers and agents whom they may appoint, and are likewise authorized to pay to themselves such compensation for their own services as they may deem reasonable. The Trustees shall also appoint from among their number an Executive Committee of three or five persons, to whom they may delegate such of the powers herein conferred upon the Trustees

as they may deem expedient, except so far as those matters are concerned in which the concurrent action of at least ten Trustees is required.

"The Trustees shall not be liable for errors of judgment either in holding property originally conveyed to them or in acquiring and afterwards holding additional property, nor for any loss arising out of any investment, nor for any act or omission to act performed or omitted by them in the execution of this trust in good faith, nor shall they be liable for the acts or omissions of each other or of any officer, agent, or servant appointed by or acting for them, and they shall not be obliged to give any bond to secure the due performance of this trust by them.

"Sixth. Shares hereunder shall be of the par value of one hundred (100) dollars each, and shall be divided into preferred and common shares. The preferred shares shall entitle the holder to a cumulative semi-annual dividend at the rate of four per centum per annum, and no more, the same to be paid or set apart before any dividend shall be paid or set apart for the common shares; and in case of liquidation, the proceeds of the liquidation shall be first applied to the payment to the holders of preferred shares of the sum of one hundred dollars per share and any accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their holdings. . . .

"Seventh. . . . Except as aforesaid, [the exception not being material] no shares shall be issued by the Trustees in excess of the amount to be originally issued to the Subscribers, as hereinbefore stated; but the Trustees may, from time to time, for the purpose of providing means for the acquisition of additional property or otherwise accomplishing the purposes of this trust, with the consent of at least two-thirds of the preferred shareholders and two-thirds of the common shareholders, present and voting at any meeting called for that purpose, issue and dispose of additional shares upon such terms and in such manner as the shareholders at such meeting may determine. . . .

"Eighth. The Trustees may, from time to time, declare and pay dividends out of the net earnings from time to time received by them, but the amount of such dividends and the payment of them shall be wholly in the discretion of the Trustees; except

that the dividends on the preferred shares shall be payable semi-annually on the first days of June and December in each year, at the rate of four per cent. per annum, and no more, and shall be cumulative, and said semiannual dividends shall be paid or set apart before any dividends are paid on the common shares.

"Ninth. . . . Annual meetings . . . shall be held in Boston, on the Wednesday following the first Monday of November, in each year. . . . Special meetings of the shareholders may be called at any time, upon seven days' notice, given as above stated, when ordered by the President or Trustees. At all meetings of the shareholders, each holder of shares, whether preferred or common, shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy. . . . No business except to adjourn shall be transacted at any meeting of the shareholders unless the holders of a majority of all the shares outstanding are present in person or by proxy.

"Tenth. The death of a shareholder or Trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of the deceased shareholder to an accounting, or to take any action in the courts, or elsewhere, against the Trustees; but the executors, administrators, or assigns of any deceased shareholder shall succeed to the rights of said decedent under this trust, upon the surrender of the certificate for the shares owned by him.

"The ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property, whatsoever, or right to call for a partition or division of the same, or for an accounting.

"Eleventh. The Trustees shall have no power to bind the shareholders personally, and the Subscribers and their assigns and all persons or corporations extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due or payable to them from the Trustees, so that neither the Trustees nor the shareholders, present or future, shall be personally liable therefor.

"In every written order, contract, or obligation which the Trustees shall give or enter into, it shall be the duty of the Trustees

to stipulate that neither the Trustees nor the shareholders shall be held to any personal liability under or by reason of such order, contract, or obligation.

"Twelfth. This trust shall continue for the term of twenty-one years, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of preferred and common shares according to the priorities hereinbefore expressed; provided, however, that if prior to the expiration of said period, the holders of at least two-thirds of the shares then outstanding shall, at a meeting called for that purpose, vote to terminate or to continue this trust, then said trust shall either terminate or continue in existence for such further period as may then be determined. . . .

"This agreement and declaration of trust may be amended or altered except as regards the liabilities of the Trustees at any annual or special meeting of the shareholders with the consent of the holders of at least two-thirds of the shares of each class then outstanding; provided notice of the proposed amendment or alteration shall have been given in the call for the meeting; and in case of such alteration or amendment, the same shall be attached to and made a part of this agreement, and a copy thereof shall be filed with the Old Colony Trust Company."

A schedule showing market quotations of preferred shares of Massachusetts Electric Companies from 1900 to August, 1917, inclusive, was as follows:

	Low.	High.		Low.	High.
1900	73½	80	1910	75	88
1901	78	95⅞	1911	83¾	96
1902	91¾	98½	1912	72¾	84
1903	75½	95	1913	64	79
1904	52¾	80½	1914	43½	66½
1905	55¼	70⅞	1915	33	55
1906	59½	75	1916	26	44
1907	37	75½	1917	20½	29½
1908	39½	64	August 1917	24½	25
1909	58½	84			

Other material facts are stated in the opinion.

The single justice found and ruled "that the decree of the Pro-

bate Court allowing said account should be in all respects affirmed unless and except in so far as a determination in the affirmative of either of the questions herein reported may require a modification of them," and reported for determination by the full court the following questions:

"(1) Whether the organization of the Massachusetts Electric Companies was such on February 26, 1903, that the investment of any portion of the trust funds in its preferred shares was as a matter of law improper.

"(2) Whether, if the original investment of a portion of the trust fund in preferred shares of Massachusetts Electric Companies was not as a matter of law improper on February 26, 1903, the retention of the investment in said preferred shares, and the failure to sell said shares before the end of the period covered by the account, were as matter of law improper, in view of later decisions of the Supreme Judicial Court in respect to similar organizations."

The report stated: "If either of said questions is determined in the affirmative, or both, then the decree of the Probate Court is to be modified so far as the decision upon said questions requires, and in all other respects is to be affirmed. If both of said questions are determined in the negative, the decision of the Probate Court is to be affirmed."

J. Noble, for the appellants.

J. G. Palfrey, for the appellee.

RUGG, C. J. These are two appeals from a decree of the Probate Court allowing an account of a trustee under the will of Mary Bates. The matters now in controversy relate to certain aspects of the propriety of an investment made by the trustee in February, 1903, of a part of the principal of the trust in so called preferred shares of the Massachusetts Electric Companies at the market price then prevailing, and to the retention of this investment to the end of the period of the account in 1917. The case comes before us by report upon agreed facts.

The facts now pertinent to the decision are that the Massachusetts Electric Companies was an unincorporated association organized and existing under a written instrument entitled "Agreement and Declaration of Trust," dated in June, 1899. The general features of this agreement were similar to those which

have come before the court in numerous cases. Property is transferred to trustees, who hold the legal title to all the assets belonging to the trust and exercise the exclusive management and control of it under the terms of the agreement. Certificates of part ownership, resembling shares of stock in a corporation, are issued to those who are the ultimate owners of the property. See *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, and cases there collected, and *Kennedy v. Hodges*, 215 Mass. 112, 114.

The Massachusetts Electric Companies acquired all or a large and controlling majority of the capital stock of thirty-six street railway and electric light corporations in Massachusetts, Rhode Island and New Hampshire. "The companies were merged from time to time and in 1906 consisted of the Boston and Northern Street Railway Company, the Old Colony Street Railway Company, and the Hyde Park Electric Light Company. Prior to 1912 the stock of the Hyde Park Electric Light Company was sold and the two other companies were merged, and the name of the consolidated company was changed to the Bay State Street Railway Company, of which the Massachusetts Electric Companies owned substantially all the common stock, being a large and controlling majority of all the stock. The Massachusetts Electric Companies did not act as an operating company except through its control of the subsidiary corporations, which operated the properties in question. The business of the Massachusetts Electric Companies consisted of holding the stock of the subsidiaries and supervising their management by means of stock control, and assisting in their financing. . . . Previous to February 26, 1903, a large number of trustees in Massachusetts had invested trust funds in the preferred shares of the Massachusetts Electric Companies and held those investments on that date. Before making the investment in question, the trustee made reasonable inquiry among bankers and brokers to ascertain how they regarded the investment, and received favorable opinions. He acted in entire good faith and so far as the financial and general business conditions and prospect of earnings of the Massachusetts Electric Companies and of the properties controlled by it were concerned there was then no reason to believe the investment to be otherwise than financially sound." Regular dividends out of earnings at the rate of four per cent per annum

were paid on these shares to and including July 1, 1904. After that none were paid until January, 1909, and since July 1, 1910, in general they have been paid at the rate of two per cent. In 1912 an issue of new preferred stock was made to take up securities and three quarters per cent of dividends then accumulated. The market value has much diminished.

The rule of law in this Commonwealth governing the conduct of trustees in the investment of the principal of their funds was stated in these words in 1830 in *Harvard College v. Amory*, 9 Pick. 446, 461: "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Good faith and sound discretion, as these terms ought to be understood by reasonable men of good judgment, were thus made the standard by which the conduct of trustees is to be measured. That is a comprehensive principle. It is wide in its scope. It is not limited to a particular time or a special neighborhood. It is general and inclusive, so that while remaining itself fixed, it may continue to be a safe guide under new financial institutions and business customs, changed commercial methods and practices, altered monetary usages and investment combinations. It avoids the inflexibility of definite classification of securities, it disregards the optimism of the promoter, and eschews the exuberance of the speculator. It holds fast to common sense and depends on practical experience. It is susceptible of being adapted to whatever conditions may arise in the evolution of society and the progress of civilization. Although more liberal to investing trustees than the law of some States and countries, it has frequently been reaffirmed and never doubted in this jurisdiction. *Lovell v. Minot*, 20 Pick. 116. *Brown v. French*, 125 Mass. 410. *Pine v. White*, 175 Mass. 585, 590. *Green v. Crapo*, 181 Mass. 55. *Corkery v. Dorsey*, 223 Mass. 97, 101.

In the application of this rule to varying facts it often has been held that, while some investment of trust funds in certain securities might be justified, a disproportionate amount of the total

ought not to be embarked in a single kind of stock or bonds. *Dickinson, appellant*, 152 Mass. 184. *Davis, appellant*, 183 Mass. 499. That particular point is not within the present report and therefore is not before us. Several cases have arisen where the facts showed improper investments in improvements upon real estate. *Brigham v. Morgan*, 185 Mass. 27. *Warren v. Pazolt*, 203 Mass. 328. In *Taft v. Smith*, 186 Mass. 31, a second mortgage upon real estate, and in *Thayer v. Dewey*, 185 Mass. 68, land in another State, were held not improper investments as matter of law upon the facts disclosed. It was decided in *Kinmonth v. Brigham*, 5 Allen, 270, 279, that the investment in a trading partnership could not be sanctioned.

The precise point reported for our determination is "Whether the organization of the Massachusetts Electric Companies was such on February 26, 1903, that the investment of any portion of the trust funds in its preferred shares was as a matter of law improper." Put in another way, it is, whether a finding that such investment was proper as matter of fact must be pronounced wrong as matter of law. The form of the report imports a finding of all facts, so far as the facts can go, in favor of the investment.

Tested by the standard established by our law, it cannot quite be said that in February, 1903, the investment of any portion of trust funds in preferred shares of the Massachusetts Electric Companies was improper and unwarranted as matter of law.

It might have been found from the nature of the properties held by the companies, the character of the agreement and the general purposes of the so called trust, that it was designed as a permanent investment, that the combination in a single ownership of the stock of so many different public service corporations covering such extent of territory and serving as matter of common knowledge numerous populous communities, was expected to equalize fluctuations of earnings and to stabilize the rate of dividends. The corporations whose securities were held were not in process of construction but were completed properties in actual operation. The extent of their earnings is not shown, but regular payments in way of dividends were made until a considerable period after the present investment was made. The form in which the case is presented to us warrants and even requires the assumption that the earning power of the public serv-

ice corporations whose securities were owned had been sufficiently tested so that at the time of the investment prudent and sagacious men of experience made purchases of these shares for permanent holding.

In the light of the agreed facts and the form of the report it is not necessary to determine whether the agreement and declaration of trust constituted a partnership among the shareholders as in *Williams v. Boston*, 208 Mass. 497, *Frost v. Thompson*, 219 Mass. 360, see *Dana v. Treasurer & Receiver General*, 227 Mass. 562, or a trust as in *Williams v. Milton*, 215 Mass. 1, where most of the earlier cases are reviewed. Assuming for the purposes of this decision that it was a partnership does not render the investment unwarranted as matter of law. On that assumption it was a partnership of a peculiar kind. It was not an ordinary business, commercial or trading partnership. The nature of its authorized investments seemingly removed it as far as possible from the common incidents of a copartnership adventure. Apparently it was guarded as fully as was practicable from speculative features and the oscillations of value incident to varying conditions of trade. There is nothing in the record to indicate that the amount of shares issued exceeded a conservative valuation of the securities owned. The rights of the shareholders were carefully guarded by the terms of the agreement. Their responsibility was reduced to a minimum so far as possible by written statement of obligations. It was expressly stated that the trustees had no power to bind the shareholders personally. All persons dealing with the trustees were confined by the agreement to the property of the so called trust to the exoneration of shareholders. See *Hussey v. Arnold*, 185 Mass. 202, 204; *Williams v. Boston*, 208 Mass. 497, 501; *Carr v. Leahy*, 217 Mass. 438, 440; *Rand v. Farquhar*, 226 Mass. 91, 96. It was required of the trustees to stipulate in every obligation into which they might enter that the shareholders should not be held liable personally. Whatever may be held ultimately as to the force and effect of those terms in the trust agreement, they manifest an effort to reduce the liability of the shareholders to the lowest limit. In any event, such liability of shareholders was not greater than the liability of stockholders in manufacturing corporations at the time the investment was made, which was before the court in *Harvard College v. Amory*,

9 Pick. 446. See *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516, for an historical review of our statutes respecting stockholders' liability for debts of the corporation. The exercise of sound judgment and good faith and a strict compliance with the terms of the agreement by the trustees would have a strong tendency to relieve the shareholders from all responsibility. The kind of corporations in which the trustees were to hold stock were chiefly and primarily public service corporations operating mainly in this Commonwealth, and of corporations incidental to or furnishing supplies to such public service corporations. The law of this Commonwealth for many years has made provision for careful supervision of the issue of stocks and bonds of public service corporations to the end that such securities may represent only honest investment necessary for valuable use to the public.

The agreed facts show that good faith and sound discretion, measured by the prevailing practice of men of experience and good judgment in such matters, were exercised in making the investment here assailed. That is the standard as established by the authorities to which reference has been made. Giving due weight to all the considerations affecting the trust agreement, no sufficient reason appears for declaring the investment unwarranted. The case is close, but falls within the rule of *Harvard College v. Amory*, *ubi supra*.

The retention of these shares and the failure to sell them before the end of the period of accounting cannot be declared improper as matter of law under all the circumstances. The decision of the question whether to sell an investment of trust funds on a falling market is a perplexing one. The agreed facts are that "except in so far as the propriety of retaining the investment was affected by the character of the organization in contemplation of law, there was nothing in the future outlook of the Massachusetts Electric Companies and its subsidiaries which required the trustee as a matter of sound discretion to dispose of the shares." The case upon this point is governed in principle by *Bowker v. Pierce*, 130 Mass. 262.

Decree of Probate Court affirmed.

ETHEL B. LAMB vs. ROBERT F. JORDAN & another,
executors, & others.

Suffolk. May 19, 1919. — June 25, 1919.

Present: RUGG, C. J., DE COURCY, PIERCE, & CARROLL, JJ.

Devise and Legacy, Residuary clause. Evidence, Extrinsic affecting writings.

Commonly a devise or legacy upon condition that the beneficiary shall not contest the will is the full expression of testamentary bounty for such beneficiary.

A testator, having two grandchildren who were children of a deceased daughter, two others who were children of a deceased son, and four daughters, made a will, which, besides a first clause as to the payment of debts and a sixth clause as to the nomination of executors, contained four clauses, a second and a third clause each giving, respectively, a legacy of \$500 to one of the children of the deceased daughter "upon the expressed condition that" the grandchild named should "not contest this will" and providing that, in case of such contest, such contestant "takes nothing." The fourth clause placed in trust for the children of the deceased son "a sum equal to the amount that my said son would have received had he been living at the time of my death, the income or what ever part thereof that said trustees shall deem necessary, to be paid said children in equal part, and said principal to be paid to the said children as they arrive at the age of Thirty five. In the event of either of them dying before reaching said age, and not having married, then his part shall go to the survivor." The fifth clause gave the residue "to my children share and share alike, the children of my deceased children to take by right of representation, subject to the conditions heretofore set forth." The same beneficiaries were living at the death of the testator as were living when the will was made. There was no contest as to proof of the will. On a bill in equity by one of the children of the deceased daughter, seeking a construction of the will, it was *held*, that

(1) The "sum equal to the amount that my said son would have received had he been living at the time of my death," which was placed in trust for that son's children under the fourth clause of the will, was not a sum equal to what the son would have received had he survived his father and his father had died intestate, but was the sum given by the fifth clause of the will;

(2) The sum thus given by the fifth clause to the children of the testator's deceased son, being given "subject to the conditions heretofore set forth," was subject to the provisions of the trust set out in the fourth clause;

(3) Under the provision of the second and third clauses, the children of the deceased daughter were excluded from sharing under the fifth, or residue, clause.

While the decision of all questions respecting the construction of a will depends upon the intention of the testator as manifested by the words he has used and an omission to express his intention cannot be supplied by conjecture, yet, if a reading of the whole will produces a conviction that the testator must necessarily have intended the giving of an interest which is not given by express and

formal words or the denial of a benefaction which is not manifested by an apt phrase, the defect must be supplied by implication and the language used by the testator so moulded as to carry into effect, so far as possible the intention which by his whole will he has sufficiently declared.

The meaning of the will above described was not ambiguous, and extrinsic evidence was not admissible upon the question of the testator's intent.

BILL IN EQUITY, filed in the Probate Court on August 19, 1918, by Ethel B. Lamb, a beneficiary under the will of William McKie, late of Winthrop, for a construction of the will.

The provisions of the will are described in the opinion.

The suit was heard in the Probate Court by *Grant, J.*, and by his order a decree was entered that "William H. Rome, Ethel B. Lamb, William McKie, and Edward McKie, take only under clauses two, three, or four of said will and are excluded from the terms of the residuary clause." Ethel B. Lamb appealed.

The appeal was heard by *Crosby, J.* Certain letters and other evidence, extrinsic to the will, were offered in evidence and excluded by the single justice, who made the following rulings:

"The question is whether William H. Rome and Ethel B. (Rome) Lamb, grandchildren of the testator, mentioned, respectively, in the second and third clauses, also take under clause five, the residuary clause of the will. Neither of the above-named grandchildren contested the will, which was duly allowed by the Probate Court for the County of Suffolk.

"In my opinion the language of the will is clear and free from ambiguity, and extrinsic evidence to show the intent of the testator is immaterial and inadmissible.

"It seems plain that if either of these grandchildren contested the allowance of the will, they were to take nothing either under the second and third clauses or under the residuary clause. As they did not so contest, I find and rule that they respectively take under the second and third clauses and also under the residuary clause.

"The provision in the residuary clause that the devise therein given are 'subject to the conditions heretofore set forth' relates only to the conditions contained in the second and third clauses, namely, that if either grandchild contests the will the grandchild so contesting shall take nothing under either clause.

"I also rule that the grandchildren William McKie and Edward McKie, children of Eldred E. McKie, deceased, are beneficiaries

under clause four, and also take under the rest-and-residue clause."

A final decree was entered, reversing the decree of the Probate Court and remanding the case to that court for further proceedings, in accordance with the order of the single justice, from which the other beneficiaries under the will appealed.

The case was submitted on briefs.

J. S. C. Nicholls & W. W. Risk, for the plaintiff.

R. H. Sherman, for the defendants.

RUGG, C. J. This petition calls for the construction of the will of William McKie, late of Boston. The testator was a widower about seventy-five years old at the time of its execution. His prospective heirs were two grandchildren, William and Edward McKie, minor children of his deceased son, Eldred, two other grandchildren, William H. and Ethel B. Rome, then aged respectively about twenty-five and twenty years, children of his deceased daughter Belle, and four daughters, one a spinster, one a widow, and two married. These persons all survived him, are beneficiaries under the will, and are parties hereto. The will contains six clauses. The first relates to the payment of debts and the last nominates executors. These have no pertinency to the present litigation and need not be considered further. The controversy is confined to the other four clauses, which are in these words: "Second. To my grandson William H. Rome, Jr. Five hundred dollars upon the expressed condition that he shall not contest this will. If he does contest then he takes nothing. Third. To my granddaughter, Ethel B. Rome, Five Hundred Dollars upon the expressed condition that she does not contest this will. If she does contest then she takes nothing. Fourth. To Robert F. Jordan and Millie W. McKie in trust for my grandchildren, sons of my deceased son Eldred E. McKie, a sum equal to the amount that my said son would have received had he been living at the time of my death, the income or what ever part thereof that said trustees shall deem necessary, to be paid said children in equal part, and said principal to be paid to the said children as they arrive at the age of Thirty Five. In the event of either of them dying before reaching said age, and not having married, then his part shall go to the survivor. Fifth. All the rest, residue and remainder of all my estate, real, personal and

mixed, I give, devise and bequeath to my children share and share alike, the children of my deceased children to take by right of representation, subject to the conditions heretofore set forth." The Rome grandchildren did not contest the will.

Clauses second and third, considered by themselves, are plain. Each gives a definite legacy of \$500 upon the explicit prerequisite that the legatee shall not contest the will. Otherwise such legatee is to take nothing under the will. Each of these clauses is complete in itself. Each has the appearance of finality. Commonly a devise or legacy upon condition that the beneficiary shall not contest the will is the full expression of testamentary bounty.

The meaning of clause fourth is not doubtful. Its rational purport is to put the two McKie grandchildren in the place of their father so far as concerns the total amount for their benefit, but to give it in trust with right of survivorship in case of the death of either unmarried before reaching the age of thirty-five years. It is to be observed that this clause does not say that these grandchildren are to receive the share which their father would have received had he survived the testator and the latter had died intestate. Its terms are that there shall be given to trustees "a sum equal to the amount that my said son would have received had he been living at the time of my death." That amount is not determined by the share he would have received in the event of intestacy of his father. It is determined by the amount which would have come to him under the will. That this is its meaning is made clear from the following clause fifth. This is a residuary clause in which no person is named but in which the beneficiaries are indicated by reference to classes of relatives. Manifestly all his children living at the time of the testator's death are included. If his son Eldred had been living, of course he also would have been included within the scope of the words used. Since he had died previously, his share is to go to his two children by right of representation. However, it does not go to them as a free and absolute gift, because it is "subject to the conditions heretofore set forth," that is to say, the conditions as to survivorship and trust which are contained in clause fourth. While these perhaps are not conditions in the narrowest and most technical sense, they are limitations upon full enjoyment and in a general and popular signification may properly be

described as conditions. Any other construction would involve giving to the McKie children a double share in the grandfather's estate to the detriment of his own surviving children, a result not naturally to be reached without unambiguous expression of purpose.

The Rome grandchildren are excluded from sharing in the residue for two reasons. (1) In the first place the natural inference from the form of words used in clauses second and third is that the legacy given in each of these clauses is the complete expression of the design of the testator for the benefit of these legatees. When a testator makes a gift to one of his next of kin on the express condition that he shall receive nothing if he publishes his disappointment by making contest as to the validity of the will, that usually is a full and consummated statement of testamentary purpose. That is the impression conveyed by the words used in clauses second and third. (2) In the second place, this interpretation is the only one which imputes intelligence to the testator in phrasing these clauses. If the Rome grandchildren are included among those who are to share in the residue of the estate, then the \$500 given to each by the second and third clauses would be a gift of that sum more than would be received by any other next of kin of equal degree or than would be received by the Rome grandchildren if they should contest the will successfully. It would be a gratuity of \$500 more than they possibly could get in any other way, upon the express condition that each one does not contest the will. It would be a gift to induce them not to do something which no rational person would think of doing. Such a provision would be without sense. It would have no foundation in reason. Such vacuity of mind cannot be attributed to the testator unless there is no escape from it.

Clause fifth is not couched in accurate or felicitous language. Its construction is not free from difficulty. But the necessary meaning seems to us to be that which we have stated. By giving to the words "subject to the conditions heretofore set forth" a narrowly constricted and somewhat technical construction, by unduly enlarging the scope of the phrase "the children of my deceased children to take by right of representation" beyond the limitations imposed by their context, and by ignoring the normal

inferences and eliding the irresistible deduction from the expressions of clauses second and third, the conclusion might be reached that both the Rome and the McKie grandchildren share in the residue. But we think that would be contrary to the intent of the testator as manifested by his whole will. That instrument should be read as a unit and all its clauses harmonized one with the others so as to constitute a rational entity so far as is consistent with the words used.

The decision of all questions respecting the construction of wills "depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words," or a benefaction to be denied which is not manifested by an apt phrase, "the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." *Metcalf v. Framingham Parish*, 128 Mass. 370, 374. *Polsey v. Newton*, 199 Mass. 450. *Jones v. Gane*, 205 Mass. 37, 44. The application of that principle leads to the conclusion which has been stated.

Extrinsic evidence to show the intent of the testator and to explain the will was inadmissible.

The result is that the decree is reversed and a decree is to be entered to the effect that the Rome and McKie grandchildren take only under clauses second, third and fourth and are excluded from benefits under clause fifth. Costs as between solicitor and client are to be allowed out of the estate, the amount to be determined by a single justice.

So ordered.

JOHN MAGEE vs. HELENA B. MAGEE & others.

Essex. March 11, 1919. — June 28, 1919.

Present: RUGG, C. J., LORING, PIERCE, & CARROLL, JJ.

Trust, Resulting. Partnership. Equity Jurisdiction, To enforce resulting trust. Equity Pleading and Practice, Parties, Answer, Cross bill, Master: motion for additional findings; report of evidence. Equity Jurisdiction, Plaintiff must come into court with clean hands.

Where three persons were equal owners of certain securities which by agreement among them were exchanged for certain real estate in Montana, the title being taken in the name of two of them at the request of the third, who informed both of the other two that, when the business was completed, he was to have his one third share; and thereafter and before such conveyance was made of the one third share, both the holders of the legal title died, leaving the third party to the transaction surviving, such third party, by a bill in equity in which all the holders of the legal title are parties defendant, may enforce a resulting trust in a one third undivided interest in the real estate and compel a conveyance to him of such interest.

Two persons made an agreement in writing for the purchase of land from a corporation, under an arrangement whereby they and the brother of one of them should share equally in the enterprise, and, upon the corporation going into receivership, they arranged to carry out the agreement with its successor in title to the land. Later the three divided equally certain money received from a transaction whereby, each assuming his own expenses, they caused the title holder to sell the land to a party procured by the brother and to pay to them the difference between the price they had agreed to pay and the price paid by the purchaser, and certain securities, also given for the land by the purchaser, were held by two of them for all three. Subsequently, by agreement among themselves, these securities were exchanged for further land, the title to which was held by two of the three for the benefit of all three. Held, that it could not be said that, in the absence of an agreement that the three should associate together as partners in the enterprise, the foregoing facts constituted them partners.

In the suit in equity above described, a motion by the defendants, who held the legal title to the land as the heirs or in the right of the heirs of the two deceased associates, for leave to amend their answer by setting up the claim that the transaction was one of a partnership, rightly was denied, and a demurrer to a cross bill by the defendants against the plaintiff to quiet the title to the real estate and for an accounting rightly was sustained, because the parties to enforce a partnership claim or a claim to an accounting would be the personal representatives and not the heirs of the deceased associates.

Relief against the plaintiff in a suit in equity, which is sought in the defendant's answer, cannot also be made the subject of a cross bill afterwards filed.

Three persons associated together in a transaction whereby they agreed to purchase land, title to be taken in the name of two of them, and caused it to be

conveyed, instead of to them, to a purchaser found by them, the seller paying them the difference between the price at which they agreed to purchase and the price at which the sale was made. One of the three did not have his name used in the transaction because he sought to procure from the seller of the land a commission for the sale in which he himself benefited to the extent of one third of the profits. Later, the three, in exchange for securities which were owned by all three and were received in the transaction, purchased land from the same seller, title being taken in the name of two so that the name of the third might not appear in a purchase, all three understanding the purpose of the third associate to be the same as before, to procure a commission from the seller. The two who held the legal title subsequently died and their heirs refused to recognize the right of the third to a one third undivided interest in the land so purchased and he was compelled to bring a suit in equity to enforce his rights. *Held*, that the fraud of the plaintiff toward the seller, which was not a fraud upon his associates, was no defence to such suit.

The plaintiff in the suit above described cannot be compelled to pay to the defendants any part of taxes and water rates, which were paid by them and their predecessors in title in relation to the land after a time when the plaintiff made demand for a conveyance of his undivided one third interest.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 9, 1913, to establish a trust in the plaintiff's favor to an undivided one third interest in certain real estate in the State of Montana, the legal title to which stood in the name of the defendants, and praying that they be required to execute and deliver to him a conveyance of an undivided one third interest in the property.

Proceedings in regard to a motion of the plaintiff to strike out a portion of the defendants' amended answer and its allowance, and in regard to a cross bill and the sustaining of a demurrer thereto are described in the opinion.

The suit was referred to a master. Such of the facts found by him as are material to the decision are described in the opinion. The defendants also moved for leave to amend their amended answer by setting up the defence that, because the plaintiff sought to defraud the Bitter Root Valley Irrigation Company into paying him a commission, he could not claim the relief sought; and also moved that the master be instructed to make certain findings and to report the evidence. All of these motions were heard by *De Courcy, J.*, and were denied. The single justice then reserved the case for determination by the full court "upon the pleadings, decrees thereon, appeals from said decrees, said motions and the master's report."

G. R. Nutter, (H. W. Babb with him,) for the plaintiff.

J. M. Maguire, for the defendants.

CARROLL, J. In 1906 the plaintiff was employed in the purchase and sale of lands in Montana by the Bitter Root District Irrigation Company, hereinafter called the District Company. In 1907 Julian M. Dodge and the plaintiff's brother, George M. Magee, made a contract with the District Company for the purchase of three hundred and thirty acres of land and a part payment of \$400 was made by George M. Magee. At or before the time the contract was made, it was agreed that the plaintiff should share equally in the enterprise with his brother and Dodge. In November, 1907, the District Company went into receivership and later was reorganized. The new company was called the Bitter Root Valley Irrigation Company, hereinafter referred to as the Valley Company. After the receiver was appointed the plaintiff opened an office in Chicago for the sale of western lands. He was not employed by the Valley Company. This company accepted the contract of the District Company and was ready to convey to George M. Magee and Dodge two hundred and fifty of the three hundred and thirty acres. In July, 1908, payment was called for under the terms of the contract. George M. Magee and Dodge then interested one Thacher in the purchase of a large tract of land in the Bitter Root Valley and at their request the plaintiff accompanied Thacher to Montana, at his own expense, and the sale of a thousand acres of land was arranged. The two hundred and fifty acres comprised in the Dodge-Magee contract was included in this larger tract.

Dodge and George M. Magee made a contract with the Valley Company, by which they were to assign their right to purchase the two hundred and fifty acres to Thacher and his associates and were to receive from the Valley Company \$12,500 for this tract at the price of \$50 an acre, that being the amount by which the Valley Company's price to Thatcher — \$150 an acre — exceeded the price fixed in the Magee-Dodge contract. This sum of \$12,500 was to be paid one third in cash and two thirds in the securities of the Thacher company, which was called Bitter Root Orchard, Incorporated. The money was paid and was divided equally between George M. Magee, Dodge and the plaintiff, the plaintiff at the same time paying his brother one third of the \$400

paid by him. Each party assumed his own expenses in promoting the Thacher plan.

After some correspondence the Valley Company agreed to convey the remaining eighty acres claimed by Magee and Dodge under the original agreement with the District Company, in consideration of the transfer to it of the securities of the Thacher company. By deed of January 30, 1909, the Valley Company conveyed to George M. Magee and Julian M. Dodge eighty acres of land in consideration of the release of the securities. The title was taken in the name of Dodge and George Magee, at the request of the plaintiff, with the understanding that one third of the property should be conveyed to him on his demand. The plaintiff's bill is brought to establish a trust in his favor of an undivided one third interest in this eighty acre tract, and to require the defendants to execute and deliver to him a conveyance of this one third share.

Dodge and George M. Magee died intestate. John T. Dodge and Mehitabel P. Dodge are the father and mother of Julian M. Dodge. Helena B. Magee is the widow of George M. Magee. It is agreed that aside from the question of partnership, the real estate of Dodge belongs to his father and mother and the real estate of George M. Magee belongs to his widow.

When the negotiations for the transfer of the eighty acres were pending, the plaintiff wrote to Dodge saying to arrange it "in your name and George's name, without appearing in it myself," and that when the business was closed, he was to secure his one third portion. He also wrote his brother: "I wish to keep out of the transaction . . . and after it is all closed, I will have another deed made out, by which you and Julian deed back to me an undivided third interest."

The plaintiff with his brother and Dodge were equal owners of the notes of the Thacher company, which notes constituted two thirds of the profits of the enterprise in which they were engaged. As the plaintiff owned a one third interest in these securities he furnished a definite part of the consideration for the conveyance of the land to George M. Magee and Dodge. From these facts a resulting trust arises in the plaintiff's favor of a third interest in the eighty acre tract against the grantees named in the deed. *Davis v. Downer*, 210 Mass. 573, 575. *Howe v. Howe*, 199 Mass.

598, 600. See *Pollock v. Pollock*, 223 Mass. 382. All the defendants are before the court and it has jurisdiction to enforce the trust. *Clark v. Seagraves*, 186 Mass. 430, 438, 439, and cases cited.

The defendants contend that the three associates were, between themselves, partners. There was not sufficient evidence to support this contention. They were equally to share the losses and equally to participate in the profits, but they did not agree nor intend to become partners. By the agreement of the parties they were to become owners of a tract of real estate and hold the title as tenants in common. The agreement related to a single transaction — to buy a particular piece of land, — and the correspondence shows that Dodge and George M. Magee were not to share in the plaintiff's commissions and whatever their relations may have been to third parties, as between themselves they were not partners. *Wheelock v. Zevitas*, 229 Mass. 167. *Williams v. Knibbs*, 213 Mass. 534.

The defendants hold the land as the heirs of Dodge and George M. Magee or in the right of their heirs. The personal representatives and not the heirs are the parties to ask for a partnership accounting. *Mason v. Mason*, 76 Vt. 287. There was no error in allowing the motion to strike out the part of the defendant's answer based on the allegations of partnership, and the demurrer to the cross bill to quiet the title and take an account between the parties was properly sustained. See *Burnside v. Merrick*, 4 Met. 537. If the defendants were entitled to relief for the water rates and taxes paid by them, this relief is sought by the amended answer, and in this respect the cross bill is unnecessary. See *Bogle v. Bogle*, 3 Allen, 158.

The plaintiff received a commission from the Valley Company for the sale of the two hundred and fifty acre tract and unsuccessfully attempted to secure a commission for the sale of the eighty acre tract. The defendants contend that the plaintiff cannot recover because of his fraud in concealing from both companies his interest in the joint undertaking in order to recover the commissions.

The master found that the District Company knew the plaintiff was jointly interested with his brother and Dodge in the purchase of the land, and that no concealment was practised on this com-

pany. This evidence is not reported and the finding of the master must stand.

The Valley Company knew that the plaintiff was part owner of the two hundred and fifty acres, and with this knowledge paid him a commission on the sale. It was further found that the plaintiff did not keep secret from this company his participation in the speculation; that he did attempt to conceal from the Valley Company the fact that he was part owner of the eighty acres, in order that he might secure a commission on this sale; that "while the officers of the Valley Company knew of the plaintiff's interest with Dodge and George M. Magee, it was not entirely clear that the company was conveying the eighty acres because of any obligation under the agreement . . . and the sale of the eighty acres may have had to some extent the aspect of a new transaction." The plaintiff was unsuccessful in his attempt to collect this commission; and it appeared that both Dodge and George M. Magee knew that the plaintiff was seeking to keep from the company his connection with the transaction, and in order to do this the cooperation of his associates was necessary.

Even if this attempt amounted to a fraud on the Valley Company it was not a fraud on his brother and Dodge for they knew of the attempt and purpose of the plaintiff. And further, the plaintiff does not seek relief from a fraud or to enforce an agreement based on fraud. The transaction which he seeks to enforce did not result from fraud. Even if a fraud were attempted on the Valley Company, it is not a defence to the plaintiff's bill; his case is made out without reference to this fraud, and the defendants cannot deprive him of his rights in the land because of the concealment practised on a third party. *Murphy v. Moore*, 228 Mass. 565. *Lufkin v. Jakeman*, 188 Mass. 528.

The taxes and water rates from November 2, 1909, to November 28, 1916, have been paid by the defendants. In March, 1909, the plaintiff wrote to Dodge asking for a deed of his share and also wrote to the administrator of his brother's estate. The land was unproductive until 1916, when it was leased. It does not appear what rentals were received and there was no evidence that any effort was made to make the land productive until that time. The legal title is in the defendants. They have been in possession of the land which they have held adversely to the plaintiff and

have received rents and profits, and there is no reason why the plaintiff should now be compelled to contribute to the payment of these taxes and water rates. *Sunter v. Sunter*, 204 Mass. 448, 454. *Clute v. Clute*, 197 N. Y. 439. *O'Hara v. Quinn*, 20 R. I. 176.

There was no error in refusing the defendants' motion that the master be instructed to make additional findings and report the evidence. *Cook v. Scheffreen*, 215 Mass. 444, 448.

A decree is to be entered for the plaintiff, directing the defendants to convey to the plaintiff one undivided third part of the land in controversy with costs.

So ordered.

SARAH M. KNOWLES vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 14, 1919. — June 28, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Negligence, Street railway. *Evidence*, Admitted without objection.

The mere facts, that a street railway car is crowded and that, by reason of such crowding, a passenger is caused to fall through a door of the car when it is opened at a stopping place and is injured, are not evidence of negligence rendering the street railway company operating the car liable to the passenger. Upon evidence, at the trial of an action against a street railway company for personal injuries received by a passenger, which tends merely to show that, at a certain station for the receipt of passengers, the cars were always filled at a certain hour of the day and "everybody was rushing wild, trying to get on," and that on a certain morning a car was so crowded that the guard "had to press the doors in," and that, when the car reached a stop about twelve minutes from its starting place and the doors were opened, the pushing of the crowd thrust the passenger in question out of the door and caused him to fall into the street, it cannot be found that the street railway company operating such car was guilty of a violation of that portion of St. 1906, c. 463, Part III, § 96, which provides, that "Every street railway company shall furnish reasonable accommodations for the conveyance of passengers, and for every wilful neglect to provide such accommodations shall forfeit not less than five nor more than twenty dollars."

It here was *pointed out* that certain evidence, which had been admitted without objection, even if it were incompetent, was entitled to be given its probative force.

TORT for personal injuries. The declaration alleged that, while the plaintiff was a passenger upon a street railway car of the

defendant, "the defendant and its servants and agents, then and there negligently caused said car to be thronged, packed and overcrowded with passengers, whereby, and by reason thereof, the plaintiff was violently thrown from said car." Writ dated October 20, 1917.

In the Superior Court the action was tried before *Irwin, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. The plaintiff called the attention of the judge to that part of R. L. c. 112, § 69, (now St. 1906, c. 463, Part III, § 96,) which reads as follows: "Every street railway company shall furnish reasonable accommodations for the conveyance of passengers, and for every wilful neglect to provide such accommodations shall forfeit not less than five nor more than twenty dollars."

The judge referred to the statute above quoted and charged the jury in substance that, if the defendant failed to comply with this statute and its failure to do so contributed to the injury received by the plaintiff, such failure on the part of the defendant was evidence of negligence. To this part of the charge the defendant excepted, contending that the statute was not applicable to the case on trial.

The jury returned a verdict for the plaintiff in the sum of \$1,500, and, in pursuance of an agreement between the parties, the judge set the verdict aside, ordered the jury to return a verdict for the defendant, and reported the case for determination by this court upon the following terms: If there was sufficient evidence to entitle the plaintiff to have the case considered by the jury, judgment was to be entered for the plaintiff in the sum of \$1,500, with interest from February 7, 1919, and costs; otherwise, judgment was to be entered for the defendant upon the verdict.

J. J. Scott, for the plaintiff.

F. Ranney, for the defendant.

CARROLL, J. The plaintiff was injured by falling from one of the defendant's cars when the door was opened for her to alight. There was evidence that the plaintiff entered the car at Harvard Square station; that "most all the seats were filled;" that in the presence of the guard and starter many people boarded the car

and it became so crowded that the guard "had to press the doors in;" that at this hour in the morning, at Harvard Square, the cars were always filled, and "everybody was rushing wild, trying to get on;" that the plaintiff was injured at Bigelow Avenue, in Watertown, which was about twelve minutes run from Harvard Square, with no intervening stop. The evidence of what happened at Harvard Square was not objected to. See *Seale v. Boston Elevated Railway*, 214 Mass. 59. Even if it were incompetent, having been admitted without objection, it is entitled to its probative force. *Hubbard v. Allyn*, 200 Mass. 166, 171.

The plaintiff testified that as the car stopped or was about to stop at Bigelow Avenue "the door went open, and I landed on the street, on my shoulder. . . . I had an umbrella and a hand-bag in my hand. Just before the door opened, it (the car) was crowded, and each one was pressing forward to get to the door. . . . At the time the door opened, there was pressure upon me . . . from the crowd. . . . I was in the same position when the door opened and when I was thrown as I was when the car started. . . . I could n't move from the time the car started at Harvard Square." A witness for the plaintiff testified that when the car stopped at Bigelow Avenue the motorman opened the door and "the people all try more pressure."

Considering all the evidence, there is nothing to show that the plaintiff was injured by reason of the defendant's negligence. In *Seale v. Boston Elevated Railway*, *supra*, the plaintiff offered to show that "before she entered the crowded car at Scollay Square . . . and that, as she was standing after the other passengers had entered the rear door of the next to the last car, the guard put his hand behind her back and pushed her into that rear door against the crowd," she testified that when the train reached Park Street station, the car door was opened and she "'went to step' and before she 'had a chance to step the crowd pushed' her and she fell out, her leg going down between the car and a portion of the station platform which curved away from the car about two feet." It was decided that the plaintiff was not prejudiced by the exclusion of her offers of proof and could not recover. This case cannot be distinguished from the case at bar, and is decisive of it.

The plaintiff's case really rests on the fact that the car was

crowded. It was said in *Burns v. Boston Elevated Railway*, 183 Mass. 96, at page 97: "The fact that the car was crowded is immaterial." This has been said in substance in numerous cases and is implied in many other decisions. *Jacobs v. West End Street Railway*, 178 Mass. 116. *McCumber v. Boston Elevated Railway*, 207 Mass. 559.

In *Willworth v. Boston Elevated Railway*, 188 Mass. 220, 222, it was held that the defendant was not in fault in failing to take measures to prevent passengers from crowding in passing from the car if the passengers were not disorderly, and where there is no reason to expect that anything unusually dangerous would happen. *Field v. Boston Elevated Railway*, 188 Mass. 222. *Marr v. Boston & Maine Railroad*, 208 Mass. 446. *MacGilvray v. Boston Elevated Railway*, 229 Mass. 65. These cases govern the case at bar.

Chase v. Boston Elevated Railway, 232 Mass. 133, is to be distinguished. In that case the person in charge of the elevator, without warning, opened the elevator door against which the plaintiff was leaning, which appeared to be a part of the wall of the elevator. The elevator was stopped about four inches above the level of the floor, and there was a settee in the way over which the plaintiff fell. In *Kelley v. Boston Elevated Railway*, 210 Mass. 454 and *Bryant v. Boston Elevated Railway*, 232 Mass. 549, the plaintiff was injured in a crowded subway station where the conditions could have been foreseen and provided for. *Kuhlen v. Boston & Northern Street Railway*, 193 Mass. 341, rests on the fact of violent conduct at a subway waiting station. *O'Day v. Boston Elevated Railway*, 218 Mass. 515, depends on *Stevens v. Boston Elevated Railway*, 184 Mass. 476, where there was a violation of a rule by a servant of the defendant, established by it for the protection of passengers. In *Treat v. Boston & Lowell Railroad*, 131 Mass. 371, *Glennen v. Boston Elevated Railway*, 207 Mass. 497, *Coy v. Boston Elevated Railway*, 212 Mass. 307, *Morse v. Newton Street Railway*, 213 Mass. 595, and *Nute v. Boston & Maine Railroad*, 214 Mass. 184, there was evidence of disorderly and unruly conduct on the part of passengers, which should have been foreseen and guarded against by the defendant. No such facts appear in the case at bar, and these cases do not support the plaintiff's contention.

St. 1906, c. 463, Part III, § 96, was not applicable to the plaintiff's case and we need not consider it.

According to the report judgment is to be entered for the defendant.

So ordered.

EZRA S. EATON & others, executors, *vs.* ELLA F. EATON.

Essex. January 20, 21, 24, 1919. — June 30, 1919.

Present: RUGG, C. J., LORING, CROSSBY, & CARROLL, JJ.

Equity Jurisdiction, Suit by executor named in unproved will to enjoin contest in violation of antenuptial agreement, Specific performance. *Contract*, Antenuptial agreement, Construction, Implied, Performance and breach. *Husband and Wife*. *Equity Pleading and Practice*, Requests and rulings, Exceptions.

A suit in equity may be maintained to enjoin the widow of a testator from contesting the proof of his will, if by so doing she violates the provisions of an antenuptial agreement between herself and the testator which was fully performed by him.

Where in an antenuptial agreement a man agrees with a woman whom he is intending to marry to provide by his will that she shall have a certain portion of his estate and she agrees to accept that portion in full of dower and of other rights which otherwise she might claim from his estate, there is an implied term of the agreement that, if the man fully performs all that the agreement requires of him, the woman will not contest the proof of a will made by the man in performance of the agreement.

One named as executor of a will made in performance of an antenuptial agreement of the character described above, in case the widow undertakes to contest the proof of the will, has sufficient interest to maintain a suit in equity to enjoin such contest although he has not yet been appointed executor.

Where a man and a woman, who are about to become husband and wife, undertake to establish by contract their respective property rights in the estate of the first to die, while the contract is to be construed according to its words, the parties do not stand at arm's length toward one another, and their relation is such that they are held to reasonableness and good faith toward one another in its performance.

While a man, who has entered into an antenuptial agreement with a woman, who becomes his wife, to give to her by will a proportional part of his estate, may make gifts during his life without breaking such agreement if the gifts are made in reasonableness and good faith toward his wife, having regard to all the circumstances, he cannot make gifts, either absolutely, conditionally, indirectly or otherwise, for the main purpose of defeating the provisions of the agreement and of preventing it from operating for the wife's benefit.

A widower with three sons made with a woman whom he was about to marry an agreement which provided that he by his will, after legacies and bequests which should not exceed a certain percentage of his estate, should divide the

rest of his estate into equal parts, one more in number than he left children or issue of deceased children surviving him, and that one of such parts should be given to each such child or issue of a deceased child and one part to his wife, her part to be held in a trust. Some years after the marriage, he became estranged and lived apart from his wife and his mind was centered upon the predominant purpose of so dealing with his property as to increase in so far as possible the share of his sons therein in rectification of what he considered the financial wrong done to them by the antenuptial agreement. Accordingly previous to his death he made various dispositions of his property for his sons' benefit, giving them large portions of it. The final form of his will provided for a trust of one fourth of the residue of his estate for the benefit of his wife, the language following substantially the language of the antenuptial agreement. The widow contested the will. The persons named as executors in the will brought a suit in equity to enjoin her from prosecuting her contest and from urging a petition for a widow's allowance, and to have specific performance of the antenuptial agreement ordered. The suit was heard by a single justice, who ordered that it be dismissed. Upon exceptions by the plaintiffs it was *held*, that a finding was warranted that the husband had not carried out the antenuptial agreement with reasonableness and good faith, and that the suit must be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 13, 1917, by those named as executors in the will of Charles S. Eaton, late of Marblehead, which will had been filed for probate but proof of which was being contested by the testator's widow, the defendant, to enjoin the defendant from prosecuting such contest and a petition for a widow's allowance and to compel her specifically to perform the antenuptial agreement between herself and the testator, described in the opinion.

Proceedings as to a demurrer of the defendant and the effect of a waiver by the defendant of an appeal from an interlocutory decree overruling that demurrer are described in the opinion.

The suit was heard on its merits by *Braley, J.*, who filed a memorandum of findings of fact and rulings of law, substantially as follows:

The testator, about fifty-three years of age, and the defendant, then Ella F. Bartlett, about thirty-eight years old, of Pasadena, California, after mature consideration agreed out of mutual esteem and affection to become husband and wife. The marriage, which followed on July 4, 1909, was the third marriage of the defendant, who was childless. The testator, a man of unusual business ability and of more than average literary accomplishments as well as of great foresight and determination in accomplishing whatever he set his hands to, had established a restaurant

on Washington Street in Boston, known as "Thompson's Spa," of which he was the sole proprietor at the date of his marriage and continued so to be until the formation of the partnership hereafter referred to. The income from the business at the time of the engagement to marry and thereafter until the testator's death averaged at least \$100,000 a year. The testator's other property appears approximately to have been in value about \$180,000. In contemplation of the approaching marriage an antenuptial agreement was executed on July 3, 1909. The conception of having such an agreement was the testator's. "I have no reason to doubt the testimony of the defendant that the testator ' . . . asked me if I would mind signing a contract whereby I would take one quarter of his property instead of one third, which was a wife's dower rights. He went on at some length why he wanted me to do this. He said his sons were about to marry, he feared that they were acquiescing because they wanted his consent to their marriage, and probably after they were married they might not be so well satisfied. He wanted them to have the very best opinion of me, he wanted them to feel I was willing to share everything with them. He asked me if I would mind signing this agreement. I said I had full confidence in him, if I had not I would not marry him; that whatever he asked me to sign I should think it was right; that I wanted the sons to realize I was sharing everything with them, if it would make any of them any happier I was more than willing to sign it.' It is conceded by the defendant's counsel that there was 'entire fairness in the making of the agreement.'" The material provisions of this agreement are described in the opinion.

"The instrument provides and it was the intention of the parties to provide for subsequently acquired property as well as the property then owned by the testator and such subsequently acquired property follows the limitations of the agreement the same as the property then owned by the testator. . . . Of course the defendant took the chances of altered business or financial conditions or of accidents to her husband's fortune which might occur before his death and reduce him from affluence to poverty. It is to be observed, however, that no power of revocation is reserved to the testator, but, having chosen to restrict himself in the manner described, he is bound by the restrictions. . . .

The agreement was to come into operation at his death and by reference to the inventory of his estate it is certain that the estate he leaves by his will, if in good faith he performs the agreement, is the estate of which the defendant is to have a one quarter share. The will, *prima facie* proof of which was introduced, in so far as it purports to carry out the agreement," did so in Article 4, the material provisions of which are described in the opinion.

"It is the contention of the plaintiffs, on whom rests the burden of proof, that by these provisions the testator has fully performed the agreement. The defendant, however, contends, and introduced evidence to show, that the testator intentionally violated the agreement by giving during his lifetime to his sons a very large and substantial part of his estate. That he transferred to them in one form or another a very large amount of property there is no question. The transactions relied on by the defendant are his dealings with the property in California, referred to in the evidence and herein as the Pasadena property, his gifts of money and transfer of securities to and the formation of a partnership with [two of his sons,] Ezra S. and Malcolm H. Eaton, giving to them at first a one seventh and later a one sixth interest in the spa and entering into a contract, which bound him and his estate and in which contract Ezra S. and Malcolm H. joined, to transfer to Charles F. Eaton, [his third son,] at first a one seventh and later a one sixth interest, whereby at his death there was actually left in his estate a one half interest in the business upon performance of the agreement with [the son] Charles. It becomes necessary before taking up these transactions in their order to refer somewhat briefly to the marital relations of the testator and the defendant, for all the acts complained of followed upon their separation.

"I find that the testator made valuable gifts of jewelry to his wife but in amount they were not beyond nor inconsistent with his income and, while they lived here and when abroad during their foreign tours in a most generous way, the expenditures, whatever their nature or however large, were made or sanctioned by the testator, who at all times had a mind of his own and commanded an ample income. I am unable to say, apart from his discharge of the mortgage on her house, that he made any other gifts; and, while her clothing doubtless was costly, the testator never

seems to have complained that she dressed beyond his means or in a style or manner unbecoming her station in life as his wife.

"For some years before his marriage the testator spent his winters in Pasadena, California, and it was there that he first met Mrs. Bartlett. The testator, having bought an eligible lot, erected and furnished a mansion house, the design and furnishings of which seems to have been a project joined in by both. The house and its furnishings cost a large amount of money; but I am not impressed with the argument that the testator, by the overmastering domination of his wife, was compelled to build this house on the scale of magnificence shown. His entire history as revealed by the evidence shows that he was not a man to be dominated against his will by anybody.

"During the winter of 1913-1914 they were living in this house as their home when he became ill, suffering, as it turned out, from some form of cardiac disease, which seems ultimately to have caused his death. I am satisfied that up to this period, despite some occasional matrimonial differences which had been adjusted, there was no thought on the part of either of a possible and final separation. But the testator's physical condition, accompanied as it was with great nervousness and occasional and severe physical prostration, caused him to be irritable and exacting, and friction began to develop between them, until in March, 1914, acting on the advice of his physician but in accordance with his own wishes and will, he left his home and went to a local hospital for treatment, where he remained until May 5, 1914, when, without having seen his wife, who remained at the house and by his orders had been denied access to him, he took the train, accompanied by his son Ezra S. Eaton, for Marblehead. The parties never met again as husband and wife, although much correspondence ensued between them.

"In his letter of July 4, 1914, he wrote his wife, 'It is my wish and intention to treat you, so far as providing for you, and in fact in all ways, fairly and justly. You must remember however that your unwifely, heartless and cruel treatment of me during my illness, has delayed my recovery many weeks and perhaps months, broken my heart spoiled the remaining years of my life and made it absolutely impossible for me to ever live with you again.' On July 15, 1914, he again wrote her, among other

things, 'I have loved you dearly and I still love you, and always shall I believe, but as I have said before we cannot live together again. I repeat this last not in a spirit of rubbing it in but for the sake of letting you know positively that I cannot change my mind in this respect, and the sooner we both realize this situation the better prepared we shall be to deal with it.' I find that the testator from his point of view had reached the conviction that his wife had turned against him and no longer loved him. Being thus convinced, he ceased to care for her or even to think of her except in terms of positive aversion and dislike. And on November 28, 1914, he brought in our courts a libel for divorce on the ground of cruelty, which was pending at his death. During his illness at Pasadena, both at his home and while in the hospital, his mind remained active, strong and clear, as shown by his continuous and very full correspondence relating to his affairs. In the deposition of Dr. Dudley Fulton, the attending physician, is found that statement, 'In his room I saw that he was worried . . . and I . . . asked Mr. Eaton if there was anything on his mind — if [he] was worrying about anything, if so, I did not want to know the details but just whether or not he had any mental worry, and he then told me about the financial wrong he had done his sons and the fact that he was not happy with the way Mrs. Eaton was treating him.' Dr. Fulton also says, 'that he was greatly worried over the injustice he had done his sons in regard to the prenuptial financial agreement with Mrs. Eaton . . .,' and 'brought up the subject of his wrong and extreme anxiety to set himself right with his sons in regard to financial arrangements' and 'expressed that he had not done his sons justice in his financial arrangements with Mrs. Eaton before their marriage.' In this connection it also should be stated that at the hospital and after correspondence by letter and telegram with counsel at Boston he called in local counsel and added a codicil to his will.

"I am unable on all the evidence to reach any other conclusion, except the conclusion that, from the time of the estrangement to the making of the will offered for probate, the testator's mind was centered upon the predominant purpose of so dealing with his property as to increase in so far as possible the share of his sons therein in rectification of what he considered to be a financial wrong done to them by the antenuptial agreement."

The single justice then reviewed the sixteen changes in the testator's will beginning with the day of his marriage to the defendant, the effect of which is described in the opinion, and continued:

"By the codicil of March 30, 1914, he directed the Pasadena property should become part of his general estate. By the codicil of May 16, 1914, while the Pasadena property was still to become part of his general estate, the widow was to receive \$4,000 a year and the trustees were authorized to lease the property to her or to let it to other persons if in their judgment this was deemed advisable. The land, house, and furnishings had cost approximately \$175,000, of which the testator had put in \$154,000, made up very largely from the proceeds of securities which he converted, and, upon Mrs. Eaton's evidence, there seems no reason to doubt that she contributed \$21,000 of her own money toward the furnishings.

"At this point I pause to say that I do not find it necessary to decide whether under the California Civil Code, § 158, and the California Code of Civil Procedure, which were introduced in evidence, the antenuptial agreement has been modified as alleged in the answer. It is a Massachusetts contract and can be modified only as provided by our laws, namely, in writing, of which there is no evidence. Nor is it requisite to go into the litigation, pending in California when the testator died, to determine whether the property is community or separate property or whether Mrs. Eaton has a right of homestead therein, or to review the correspondence between testator's counsel in California and his counsel here concerning the legal step necessary to be taken to try out these alleged rights. It is enough to say that the result was the formation of a corporation in California with a capital stock of \$100,000, the par value of the shares being \$100 each, to which the testator transferred the property, receiving therefor the entire issue of stock in payment. Of this stock \$99,000 par value was transferred by him to his sons in return for their promissory notes without interest for \$30,000 each. The testator also gave to them an agreement to indemnify them out of his estate for any loss suffered if Mrs. Eaton succeeded in establishing a right of homestead in the property or any other rights which would cut down or encumber the fee. The actual cash outlay by the three sons appears to have been a share apiece, the testator putting in \$100 for the share issued to Charles. When all this had been accomplished,

the Pasadena property, being worth, as shown in evidence, at least \$150,000, with an annual rental value of from \$10,000 to \$12,000, had been disposed of for \$90,000 and in such a way that the sons owning nine hundred and ninety shares of stock, controlled the corporation, which is not shown to be indebted, and the entire title to the property subject to whatever rights, if any, Mrs. Eaton may have under the laws of California. It is plain, of course, that the sons can never be called upon to pay any interest on the notes; nor, on the evidence, could either son at the time the notes were given have paid any substantial portion of the principal from any money of his own. In passing upon the testator's dealings with the Pasadena property I have not deemed it material to set forth in detail the many phases of the transaction or transactions, although I have considered them all, including the formation of the corporation, the object and purposes thereby sought, the transfer to the corporation by the testator, the issuance of the stock to him, the transfer by him of the stock to his sons, the taking of their unsecured promissory notes for less than the par value of the stock, the indirect acquisition by them as the beneficial owners of property for \$90,000 worth at least \$150,000, and the giving of the agreement of indemnity, all of which steps were deliberately and advisedly taken by the testator with full knowledge of not only the terms but the legal effect of the antenuptial agreement upon his testamentary rights.

"I pass to the gifts or transfers to his sons of cash, stocks and bonds. During a period beginning in October, 1914, and ending in August, 1917, I find that Ezra S. Eaton received in money, stocks and bonds, \$57,641.08; Malcolm H. Eaton, exclusive of mortgage on Malcolm's house for \$25,000 given to Charles, \$57,641.76; Charles F. Eaton, \$55,593.86, making a total of \$170,577.42. It appeared in evidence that the testator said that these gifts were made for the purpose of giving to each son an amount equal at least to the payments made to Mrs. Eaton after the separation, whether voluntary or under order of court or stipulation of counsel after the divorce proceedings were begun, and the expenses of the litigation paid to Mrs. Eaton's counsel. I find that for a period beginning in May, 1914, and ending on September 29, 1917, the testator advanced to Mrs. Eaton in one way or another but within the classification above

stated the sum of \$73,700. The testator's income from the spa from May 1, 1914, to October 13, 1917, may be said to have been substantially \$347,750.99. If the payments to Mrs. Eaton and the gifts are deducted, he had \$177,723.57 for his personal and other expenses. The plaintiffs contend that all the gifts were from income exclusively derived from the spa, that is, current income and not income which had been capitalized, so to speak, by investments in stocks and bonds. But it is to be observed that the distribution was not only of cash but of a very appreciable amount in stocks and bonds. When he converted the income into stocks and bonds it would seem as if technically the income had been capitalized and the gifts of such stocks and bonds thereafter were gifts which diminished the principal; but, however this may be, there is evidence which I cannot wholly disregard, that the proceeds of the 'American Sugar Stock' and 'West End Stock,' sold by the testator and which had not been bought from current income during the period named, were used to buy the bonds distributed to the sons.

"Coming to the formation of the partnership consisting of the testator, Ezra and Malcolm, I have no doubt that the testator very earnestly desired that his sons eventually should succeed to the business which had been established and made successful through his efforts of some thirty-three years, aided, however, very largely by the long and loyal service of four able employees who had his entire confidence and upon whom he greatly relied. They are constantly referred to in the evidence as the 'big four.' It is not too much to say that during his absence in California winters, as well as when he was abroad, they practically ran the business. The sons Ezra and Malcolm, after completing their collegiate education, had been engaged before the formation of the partnership on wages or salary at the spa, which seems to me under all the circumstances not to have been unreasonable. The partnership was formed on November 13, 1915. At that time the personal property of the testator in the business had a value at least of \$550,000, exclusive of the good will. The business for the year ending December 31, 1915, showed a net profit of \$83,577.38. On December 31, 1916, the net profit was \$120,677.35. The uncontradicted evidence is to the effect that the business as a whole, independently of the testator's ownership of a part of

the realty and his rights as lessee under leases of other parts, was worth from \$800,000 to \$1,000,000. By the contract of partnership the sons Ezra and Malcolm were each given and received by the terms of the conveyance a one seventh share for the term of ten years from the date of the agreement, or for such further time as the parties might determine, while the remaining five sevenths represented the interest of the testator. As to profits, the agreements provided, 'The partners shall be entitled to the net profits of the business in the shares above mentioned, i. e. five-sevenths ($\frac{5}{7}$) to Charles S. Eaton, one-seventh ($\frac{1}{7}$) to Ezra S. Eaton and one-seventh ($\frac{1}{7}$) to Malcolm H. Eaton. These profits shall be in lieu of salary or other compensation but the partners may draw from time to time on account of the profits such sums as may be mutually agreed upon. At the end of each year a general account shall be taken and the profits of each partner for the year determined and payment in full made thereof.' While I find that they were diligent and efficient in the performance of their duties, I am unable to find that their services were worth during the year 1915 \$24,000, or during the year 1917 \$66,000; or, in other words, in November, 1915, the date of the articles of copartnership, Ezra and Malcolm each were being paid \$7,500 a year as salary, to which was added one seventh of the profits, amounting to about \$12,000 apiece. In 1917 the year that their shares were increased from one seventh to one sixth, Ezra and Malcolm, including their respective salaries of \$15,000, got \$66,000. I find there was not past consideration for the agreement of partnership and the sons contributed no capital. The testator and Ezra and Malcolm as between themselves were co-principals or co-owners in a common business enterprise which of course included the profits. The testator accordingly during his lifetime would receive his share of the profits earned by the entire capital, while at his death only one half, after the sixth had been conveyed to Charles, remained as part of his estate under the terms of the will. But this is not the only consequence which must follow. The surviving partners have the exclusive right to possession of the firm's assets and to liquidate the firm's capital; and in a partnership accounting, Ezra and Malcolm are entitled to any and all sums by way of profits due to them, a part of which it is claimed they put back into the business."

The single justice then quoted article sixth of the will, described in the opinion, and continued: "These mandatory provisions and the formation of the copartnership are to be viewed as a whole when considering the scheme of the testator. It may well be asked where ordinarily in the open market could a purchaser be found for a business of this character who would buy a half interest therein with the sons owning and controlling the other half. It is true that the scheme legally does leave at least a half interest as the property of the testator; but practically the sons by reason of the partnership arrangements and their rights in liquidation as copartners and the rights given them under the will dominate the situation and can acquire the remaining half substantially on their own terms.

"The plaintiffs, [executors, two of whom are two of the three sons of the testator, and the third son,] appreciating this aspect of affairs have filed the following stipulation: 'The undersigned, who are the executors named in the last will of said Charles S. Eaton and his heirs at law, admit the jurisdiction of this court in the exercise of its discretion to direct by final decree or by order entered in this suit the manner in which the interest of said Charles S. Eaton as a partner with his sons in the business known as "Thompson's Spa" shall be converted into cash, and in the exercise of such discretion and in that behalf to direct that the business and assets of the partnership be sold as a going concern to the highest bidder to be paid in cash, without prejudice, however, to the rights, if any, of the surviving partners to compete in like business with the purchasers at any such sale as fully and to the same extent as if this stipulation had not been filed.'

"Apart from the very serious question as to the authority of the present plaintiffs to bind the estate by any such stipulation, the defendant, who has declined to accept it, has the absolute right to demand specific performance, not only of the executors but of the heirs at law in accordance with the antenuptial agreement, a right which a court of equity ought not to cut down, but preserve. It would seem to be manifest that, if all the gifts and transfers to his sons as previously described had been contained in the will couched in the same or substantially the same terms, the testator could not be found to have specifically performed

his part of the antenuptial agreement. He covenanted to give to the defendant by his will as much as he gave to any of his sons. To say that the testator fulfilled his agreement to give to her an equal share, and then to say that he performed his agreement by indirectly or directly conveying a substantial part of his property to his sons, is a mode of performance which cannot be sanctioned. . . . The fact that notice of the formation of the proposed partnership was given to counsel for the defendant, who at once denied the testator's right to make such transfers of his property, did not do away with his prenuptial obligations.

"I find that the contract or contracts of partnership were entered into for the ulterior purpose of rendering nugatory as far as possible the stipulations of the antenuptial agreement as to equality of participation and distribution of the residue, as well as to enrich the sons at the expense of his wife. Nor were these agreements any the less fraudulent and testamentary in character, although not testamentary in form, because consummated openly with the purpose of evading the antenuptial contract. Whatever disagreements from whatever cause existed between Mr. Eaton and his wife, and whether he was justified or not in his opinion of her conduct during the period heretofore referred to, he had no more right to diminish her lawful claims than he had to defeat the whole object of the settlement. As I have previously said, the taking of the sons Ezra and Malcolm into partnership was not a gift out and out of one seventh subsequently enlarged to one sixth, to each of them freed from any possible control by himself. He was to share, and shared during the remainder of his life, in his proportion of the net profits from the whole business. It is only upon his death and a winding up or settlement of the partnership affairs that his interest as distinguished and separate from theirs and the rights of Charles can be ascertained and sold under article six of the will, the sons or any of them at such sale to be given the preference if they so desire over 'any other prospective purchasers.'

"While I said to counsel during the trial and without making any final ruling, that the question of intent or motive might not be of controlling importance if what the testator did produced the effect described, I am satisfied upon examination of the cases, that it may be a material element in a case like the one at bar,

where an antenuptial agreement exists, even if, as some of the cases hold, a husband not under such an obligation may give away all his personal property for the express purpose of depriving his wife, if she survives him, of any participation therein.

"By the manipulation of his property in the manner above described, the sons share alone in the Pasadena property and in the stocks and bonds, while fifty per cent of the business of the spa as a going, prosperous concern, the source and continuous supply of the testator's wealth of every kind is also shared solely between them, leaving the widow to participate in only one quarter of what is left. If the will had been admitted to probate and the present plaintiffs appointed executors and a bill had then been brought to compel the defendant to accept the performance tendered by the will, a court of equity would not under the conditions above described decree specific performance. . . . Applying the same rule to the case at bar a decree is to be entered dismissing the bill with costs."

The plaintiffs made nineteen requests for findings of fact and three requests for rulings of law. The requests for rulings of law, which were refused, were as follows:

"16. By the antenuptial agreement Mr. Eaton covenanted to give to his wife by will the stipulated interest in the estate belonging to him at the time of his decease; he did not covenant either in terms or by implication not to make the gifts to them or form the partnership arrangements with them which are questioned in this case, and neither said gifts nor said partnership arrangements or contracts violate any of the terms of the antenuptial agreement.

"17. Article 6 of the will does not oblige or purport to oblige the sons or any of them to purchase the testator's share in partnership, or in case they desire to become purchasers, does not oblige or purport to oblige them to accept the preference therein authorized or to pay the purchase price in notes. It is wholly within the rights of the sons by filing the stipulation waiving such preference and such payment, to make it the plain duty of the surviving partners and of the executors of the will to see that the partnership assets and the testator's share in the partnership are reduced to cash in the most advantageous manner, and their action in so doing renders it needless to consider the defendant's claim that

the giving of such preference and the payment of the purchase price in notes would or might violate her rights under the agreement."

"19. Upon the facts found by the court the plaintiffs are entitled as a matter of law to the relief sought."

The plaintiffs alleged exceptions.

S. L. Whipple & W. R. Sears, (B. B. Jones with them,) for the plaintiffs.

C. F. Choate, Jr., (J. D. Colt with him,) for the defendant.

RUGG, C. J. This suit in equity is brought by the persons named as executors in an instrument purporting to be the last will of Charles S. Eaton, late of Marblehead, who died in October, 1917, to enjoin the defendant, his widow, from contesting the allowance of the instrument as such last will and from petitioning for a widow's allowance, and to compel her to perform specifically the terms of a certain antenuptial agreement executed between her and the deceased a day or two before their marriage in 1909.

The defendant filed a demurrer, for want of equity amongst other causes, and appealed from an interlocutory decree overruling it. The same matter was set up in answer. The defendant in open court has waived her demurrer. Under these circumstances it is necessary only to consider whether the court has jurisdiction of the subject matter. Consent or waiver by the parties cannot confer jurisdiction over a cause which is not vested in the court by law. It is the duty of the court to consider that point of its own motion. *Peabody v. School Committee of Boston*, 115 Mass. 383. *National Fertilizer Co. v. Fall River Five Cents Savings Bank*, 196 Mass. 458, 462. *Fourth National Bank of Boston v. Mead*, 214 Mass. 549. *Boston Bar Association v. Casey*, 227 Mass. 46, 50.

The bill sets out an antenuptial agreement, executed in due form, according to the terms of which the defendant agreed to accept certain testamentary provisions to be made in her behalf by the deceased in place of all other claims upon his estate, and alleges that the deceased complied with all the stipulations of that agreement on his part to be performed, and made and executed a will wherein all the obligations to the defendant under the antenuptial contract have been met; that the deceased by

nominating the plaintiffs executors under the will imposed upon them the duty of presenting the will for allowance, and that in the attempt to perform that duty they find themselves obstructed wrongfully by the defendant in defiance of her covenant with the deceased. The prayer of the bill in substance and effect is that the obstacle in the way of their performance of duty caused by this unlawful conduct of the defendant may be removed. This presents a case under the circumstances within the jurisdiction of a court in equity. It is a necessary implication of every valid contract with covenants binding each party, that neither will interfere to prevent performance by the other. *Hebert v. Dewey*, 191 Mass. 403, 410. *Bailey v. Marden*, 193 Mass. 277, 279. *Tighe v. Maryland Casualty Co.* 218 Mass. 463, 468. It is an implied term of the antenuptial agreement here in issue that the defendant will not contest any will made by the deceased provided he carried out that agreement in all its parts. Such an agreement, after it has been fulfilled by the one agreeing or reserving to himself the right to execute a will, entitles his representatives to specific performance in equity. *Sullings v. Richmond*, 5 Allen, 187. *Tarbell v. Tarbell*, 10 Allen, 278. *Jenkins v. Holt*, 109 Mass. 261. *Paine v. Hollister*, 139 Mass. 144. Contracts made after the death of a testator, as to the disposition of property received under the will, between legatees, heirs at law and others having a pecuniary interest therein, are recognized as valid and are enforced in equity. *Ellis v. Hunt*, 228 Mass. 39, and cases there collected. The heir at law of a deceased person, who has entered into an antenuptial contract as to the share to be received by his wife from his estate, may enforce specific performance of the contract. *Collins v. Collins*, 212 Mass. 131.

The case at bar falls within the principle of these decisions. The plaintiffs, although not yet appointed by the Probate Court as executors, have the specific duty to present and seek to have allowed the instrument purporting to be the last will of the deceased. They have sufficient interest to invoke the aid of equity against one who under these circumstances hinders them in the discharge of that duty contrary to the terms of her contract with the deceased.

The case was heard on its merits by a single justice of this court, who made findings of fact incorporated in the record and

ordered the bill to be dismissed. The case comes here on exceptions by the plaintiffs. The pertinent facts as thus found are that the deceased, a widower of about fifty-three years having three sons, became engaged to be married to the defendant, then a widow of about thirty-eight years, in 1909. The deceased had established and was the sole proprietor of a restaurant in Boston known as "Thompson's Spa." He was a man of unusual business ability and of more than average literary accomplishments, as well as of great foresight and determination in pushing through to a conclusion whatever he resolved upon. His business income from the time of his engagement until his death averaged not less than \$100,000 per year. His other property was at least \$180,000. In contemplation of his approaching marriage, the deceased conceived the idea of an antenuptial agreement, which he proposed to the defendant. It is conceded that this agreement was fairly made. After appropriate recitals, its essential terms enabled and bound him, provided the defendant became and continued his lawful wife and survived him, (1) to make such disposition of personal effects as he chose, (2) to give to such persons or purposes as he might name legacies not exceeding ten per cent in value of his real and personal estate as ascertained by the probate inventory, (3) to divide the residue into equal parts, one more in number than there were surviving children and issue of any deceased child taking by right of representation, one part to the defendant, one part to each surviving child, and one part to the issue of each deceased child by right of representation, the share of the defendant to be held by trustees on a spendthrift trust, the net income thereof to be paid to her during life, (4) to accept and receive from the estate of the defendant in case he survived her only that which might be willed to him. The defendant covenanted that, in case the deceased performed the stipulations resting on him under the agreement, she would accept the same in full of dower and other rights which otherwise she might claim from his estate. Three sons survived the deceased. He left no child nor children of a deceased child. Article 4 of the instrument offered for probate as the will of the deceased, after a recital in part of the provisions of the antenuptial agreement, and an assertion that it is made in pursuance of the terms of that agreement, establishes a spendthrift trust of one fourth

share of the remainder of his estate for the benefit of the defendant during her life, with a gift over. The sale of his interest in the spa as soon as may be done without unreasonable loss is directed by Article 6. It there is provided that his sons or any of them shall be given a preference over other prospective purchasers to the extent of permitting them to purchase at the same price offered by any *bona fide* purchaser, payment to be made wholly or in part by their unsecured notes bearing interest not exceeding four per cent pending the settlement of his estate.

The plaintiffs contend that this will, with all its antecedent and concurrent facts, constitutes a performance of the antenuptial agreement. The defendant contends that the deceased intentionally violated that agreement during his life by giving to his sons for the purpose of defeating its covenants, a very large and substantial part of his estate.

It is not necessary to narrate the biographical details of the married lives of the deceased and the defendant. It is enough to say that, having been married in 1909, an estrangement came in 1914, followed by a separation, the deceased leaving the defendant at a house built at Pasadena, California, by him after the marriage at an expense including furnishings of approximately \$175,000, to which the defendant had contributed \$20,000, being substantially all of her estate. After a few months he returned to his home in this Commonwealth and later filed a libel for divorce, which was pending unheard at the time of his death. During the period of his married life with the defendant before the estrangement, the deceased made to her valuable gifts and was most generous in expenditure for her dress and travel, but not in amounts beyond or inconsistent with his ample income. From the time of the estrangement until the execution of the instrument offered for probate, the mind of the deceased "was centered upon the predominant purpose of so dealing with his property as to increase in so far as possible the share of his sons therein in rectification of what he considered the financial wrong done to them by the antenuptial agreement." In execution of that predominant purpose, with the full knowledge of the antenuptial agreement and its relation to his testamentary rights, he deliberately did three main things: (1) He caused to be organized a corporation for the ownership of the Pasadena property,

the ultimate result thereby accomplished, without setting forth its various steps, being the indirect acquisition by his three sons, through holding of capital stock of an unindebted corporation, of property worth at least \$150,000 with an annual rental value of from \$10,000 to \$12,000 for \$90,000, the share of each son in even that payment having been made by his non-interest bearing note. (2) He sold stocks owned by him at the date of the antenuptial agreement and out of the proceeds, probably combined with other investments of current income from the spa, between October, 1914, and August, 1917, gave to his three sons sums aggregating \$170,577.42. (3) In November, 1915, he formed a partnership of the business of the spa with his two older sons. This business then was worth at least \$550,000 exclusive of the good will, and on uncontradicted evidence was worth as a whole independently of leasehold or other rights in realty from \$800,000 to \$1,000,000. The share of each of the sons was one seventh both in assets and profits and of the deceased, five sevenths. In August, 1917, the share of each son was increased to one sixth and that of the deceased diminished to four sixths. At the same time the deceased and these two sons agreed with the third and youngest son that he should become a partner and be given a one sixth interest by the deceased in 1922, provided this son should earn his right to it by faithful and diligent service in connection with the business at a salary commensurate with his work. Pursuant to this arrangement the two older sons in 1917, including salaries fixed at \$15,000, each received \$66,000 from the business of the spa. There was no past consideration for the copartnership and the sons contributed to it no capital. The interest of each was a pure gift from the deceased. The two elder sons as surviving partners of the spa would have the exclusive right to possession of the firm's assets and to liquidation of its capital. In this connection the provisions of Article 6 of the will confer upon them a dominating position respecting that business. The finding of the single justice touching this matter is that the contracts of partnership were entered into for the ulterior purpose of rendering nugatory as far as possible the stipulations of the antenuptial agreement as to equality of participation and distribution of the residue as well as to enrich the sons at the expense of his wife, and that these agreements and transfers were "fraudulent and

testamentary in character, although not testamentary in form" and were made for the purpose of evading the antenuptial contract. It is further found that "the taking of the sons Ezra and Malcolm into partnership was not a gift out and out of one seventh subsequently enlarged to one sixth, to each of them freed from any possible control by himself. He was to share, and shared during the remainder of his life in his proportion of the net profits from the whole business. It is only upon his death and a winding up or settlement of the partnership affairs that his interest as distinguished and separate from theirs and the rights of Charles [the youngest son] can be ascertained and sold under Article 6 of the will, the sons or any of them at such sale to be given the preference if they so desire over 'any other prospective purchasers.'" Several changes in will and codicil were made during the period of estrangement, the practical effect of which was not to increase and probably was to diminish the defendant's testamentary share in the estate of the deceased.

The findings of fact must be accepted as final. It is plain that they are supported by the evidence. That the conduct of the deceased was deliberately designed is manifest not only from all the circumstances, including his general intelligence and intellectual acumen, but especially from his refusal to accept and follow the advice of the one who had been his attorney for many years and who drew the antenuptial contract, to the effect that under its terms he could not give interests as partners in the spa to his sons, and his resort to the counsel of others.

The refusals to make certain findings of fact requested by the plaintiffs present no question of law. The single justice saw the witnesses and observed their manner of testifying, and was in a better position than any one else can be to pass upon their credibility. A bill of exceptions in equity presents only questions of law. *Kennedy v. Welch*, 196 Mass. 592, 594. *Malden & Melrose Gas Light Co. v. Chandler*, 209 Mass. 354, 357. It was the province of the single justice to make a final determination touching the facts put in issue by the pleadings. Requests for findings of fact in such connection have slight, if any, relevancy at this stage of the case. See *Warfield v. Adams*, 215 Mass. 506, 520.

The precise question presented is whether, when a man has made an antenuptial contract with a woman, who in reliance

thereon becomes his wife, to give her by will a share of his estate equal to that to be given by will to others, the husband lawfully may by deliberate design for the express purpose of diminishing the money value of the testamentary provision for the wife, make lavish gifts from his estate to others during his life. That question never before has arisen for adjudication in this court.

It was held in *Redman v. Churchill*, 230 Mass. 415, reviewing and affirming earlier decisions, that a husband, who was under no contractual obligation to his wife, has "the right to dispose of his personal property during his lifetime without her consent, and she cannot impeach a gift made by him as a fraud upon her because made to prevent her from acquiring any portion of it." It was held in *Kelley v. Snow*, 185 Mass. 288, that a wife under no antenuptial covenants may make a present transfer of all her personal property to a trustee, retaining a beneficial interest to herself during life with gift over to a third person on her death, and reserving the right of variation by subsequent appointment, even though all this is done for the express purpose of preventing her husband from sharing in her estate. Those decisions do not reach to the point now to be determined, because no antenuptial contract was involved in either of them. The intent of a donor is of no consequence in such a case, because the rights of the relict in the property of the deceased spouse is purely the creature of statute. Each is entitled to that which the statute establishes and to nothing more, and the statute says nothing about intent. The fact alone is controlling.

The decisions are uniform, so far as we are aware, to the effect that where there is an antenuptial contract and the parties to the marriage have voluntarily elected not to depend upon the provisions of the law but upon the terms of an express agreement, a different rule applies. Such parties are not absolutely free to give away their property at their own volition. The reason for a different rule doubtless is that, where a man and woman who are to become husband and wife undertake to establish the rights of each in the property of the other by contract, they are held to reasonableness and good faith in its execution. The contract is of course to be interpreted according to its words. No contract is to be construed in conformity to the mere unexpressed expectation of the parties to it. Hope of the one or apprehension of the

other not written into the agreement constitutes no part of its obligation. There are, however, certain implications which arise out of the nature of the transaction where a man and woman in contemplation of marriage attempt to settle by contract their respective property rights in the estate of the one who shall die first. The participants in an antenuptial contract do not stand at arm's length with reference to each other. Their relation is one of highest trust and confidence. It demands the utmost good faith on the part of each. This is not only a necessary concomitant of the execution of such an instrument, but the performance of its stipulations must also be in the same spirit. Without analyzing further the grounds for a different rule governing the rights of parties to an antenuptial contract from that which governs the rights of a husband and wife unaffected by such contract, it is enough to say that the substantially universal consensus of common law courts to that effect is a sufficient basis for its existence, recognition and acceptance. What that rule is has been differently phrased by judges of eminence. One of the most frequently quoted statements is that of Lord Chancellor Brougham in *Logan v. Weinhold*, 7 Bligh, (N. S.) 1, upon which the plaintiffs strongly rely. That was a case where, amongst other matters, an uncle, after reciting the intended marriage of his niece, covenanted upon her marriage to give by will to her or to the issue of her marriage as much as he gave by will to anybody else. The marriage took place. Thereafter the uncle bought estates with life use to himself and remainder to persons other than the niece and her issue. It was with reference to those facts that it was said at page 53: "Now, upon due consideration of the authorities and principles of law, I take the rule touching these matters to be this: If a person covenants or agrees, or in any manner validly binds himself to give to A. by his will as much as to any other, he may put it out of his power to do so by giving all in his lifetime; or if he binds himself to give A. as much as B. by his will, he may in his lifetime give B. what he pleases, so as his will shall give A. as much as his will gives B.; but then, the gifts which he makes in his lifetime to B. must be out and out; for, if to defraud or to defeat the obligation which he has entered into, he gives to B. any property real or personal over which he retains a control, or in which he reserves an interest to himself; then in order to

protect the agreement or obligation which he has entered into, and to defeat the fraud attempted upon that obligation, and to prevent his escaping, as it were, from his own contract, this gift to B. shall be taken as testamentary, — shall be taken as if included in the will, — and the subject matter of it shall be brought back and made the fund out of which to perform the obligation: at all events it shall be made the measure for calculating and ordering the performance of, or dealing with the claim arising under that obligation.” To the same general effect see *Fortescue v. Hennah*, 19 Ves. 67, and *Johnson v. Hubbell*, 2 Stockt. 332, 337.

It is manifest from the reasoning and decision of *Kelley v. Snow*, *ubi supra*, that such reservation of income for life and gift over of remainder at the death of the donor as was before the court in *Logan v. Weinholt*, is not “testamentary” in any true sense. There is nothing essentially testamentary in the act of a man making a present gift of his property to a trustee, reserving income for life to himself with remainder at his death to third persons. A man free from legal requirement to anybody respecting the disposition of his property may give it in that or a similar way and such remainder vests at once in the remainderman. An instrument of that sort need not be executed with the formality required for a will. Apart from any agreement and having regard to the statute of wills, the arrangement before the court in *Logan v. Weinholt* contravened no principle of law. *Kelley v. Snow*, *ubi supra*. But a court of equity laid hold of those facts and invalidated that arrangement in *Logan v. Weinholt* simply because it was unreasonable, or fraudulent, or lacking in good faith, or in violation of the implications of the agreement, and treated the disposition as “testamentary” in nature. The underlying justification for such interference by equity is that the act was designed to and would accomplish, if permitted to stand, the defeat of the obligation of the covenants and frustrate the fair performance of the contract. It also is to be noted that in that case the attempted gifts were held contrary to the contract. It was not necessary to state with fulness and precision the converse of the rule whereby gifts would be held valid.

The rule was put with more comprehensiveness and accuracy by Lord Hatherly, while Vice Chancellor Wood, in a case involving a

covenant in a marriage settlement for the benefit of his son by a father, in these words: "It is true, that, notwithstanding the covenant, the father might have disposed of the whole of his property in his lifetime, provided such disposition were not made in fraud of or for the purpose of defeating his covenant, as it was in *Jones v. Martin* [3 Anst. 882, more fully reported in 5 Ves. 266, n.]" *Eyre v. Monro*, 3 Kay & Johns. 305, 309. These words are quoted with approval and followed in *Keays v. Gilmore*, Ir. R. 8 Eq. 290, 294, 295. The rule as stated by Lord Hatherly was foreshadowed in *Gregor v. Kemp*, 3 Swanst. 404. The facts there were that Joan Kemp covenanted to will one fourth part of her estate for the benefit of A. Repenting of the terms of her agreement, she sought by present gifts to transfer £1,000 to others. The Lord Chancellor was of opinion that the disposition was in fraud of the covenant. He conceded that, notwithstanding the agreement, Mrs. Kemp was not restrained from disposing of any of her estate in any way in her lifetime and had full power over it but "with this single exception (viz.) she was restrained from making a distribution on purpose to defeat the covenant." The rule of Lord Hatherly was adumbrated by the still earlier decision of *Webster v. Milford*, 2 Eq. Cas. Abr. 362, 363, where the Lord Chancellor is reported to have said in substance though with brevity, that under marriage articles it is not in the power of the husband purposely to defeat the articles by alienation or gift of his property. See in this connection *Randall v. Willis*, 5 Ves. 262, and *Jones v. Martin*, 3 Anst. 882, reported much more fully in 5 Ves. 266, note.

In *Dickinson v. Seaman*, 193 N. Y. 18, 24, the query was put whether under a marriage agreement the deceased husband "could give away all his property to his own relatives, and thus defeat the antenuptial contract altogether." And it was said "assuming that he could not do this because it would be unreasonable, it is further asked where the line is to be drawn between the power to give away all and to give away nothing. That line is to be drawn where the courts always draw it when they can, along the boundary of good faith. If the decedent had given away property with furtive intent, for the purpose of defeating the antenuptial contract and of defrauding the plaintiff, the gift would have been void." In *Vanduyne v. Vreeland*, 1 Beas.

142, an agreement by an uncle that he would take into his family an infant nephew and give him property at the death of the uncle and his wife, was the subject of inquiry. It there was said: "The defendant, Vreeland, had a perfect right to dispose of the property as he pleased, provided he did not make a disposition of it to take effect after his death, which would have been a fraud in law, or constructive fraud upon the agreement, whether he intended it as a fraud or not, or a disposition of it, for the sole purpose of defrauding the complainant, and depriving him of the benefit of his agreement, which would have been an actual and positive fraud." In *Austin v. Davis*, 128 Ind. 472, it was recognized that under agreement for adoption of and testamentary gift to a child there was a limitation upon the right to make gifts to other persons during life; that they must not be made for the purpose of defrauding the child, and must be "made in good faith."

Several of the decisions to which reference has been made involved agreements touching the disposition of property by will for persons who were not either the husband or the wife of the testator. There is at least as strong ground for holding that such agreements between persons in contemplation of marriage impose restrictions upon the right to give away property to others as there is for reaching such a conclusion as to like agreements made between persons not in contemplation of marriage.

Apart from the authority of decided cases and on reason there appears to us to be no sound distinction between an out and out gift by the covenantor under an antenuptial agreement for the purpose of defeating the agreement and a present gift to a third person for the same purpose of the principal of a fund or estate with reservation of income or use to the giver for life, there being no clause in the agreement expressly covering the point. The one manner of giving is no more testamentary in its essence than the other, using the word "testamentary" with accuracy of meaning. If regard be had to the effect upon the wife, it is the same in either event. If regard be had to the effect upon the donor, he suffers no more by making such a gift of remainder than if he carried out his agreement. The effect upon him, however, is an immaterial factor. The antenuptial agreement, so far as concerns the wife, is not made for the benefit of the husband. His testa-

mentary power is affected, sometimes by restriction, sometimes, as in the case at bar, by enlargement. The purpose of the covenantor in case of either manner of giving is to prevent the operation of the agreement upon his property to the end that he may accomplish a detriment to his wife. The cases, which hold that a settlement with reservation of life estate to the donor and remainder over is bad, rest upon the proposition that it is a fraud upon the marriage agreement perpetrated to defeat its obligation. It well may be that such settlement is proof positive of a purpose fraudulent as against the marriage agreement. It is, however, equally a fraud upon that obligation and equally designed to defeat the covenant to make a present gift for that purpose. Harm to the covenantee follows equally in each case, whatever may be the form of the gift.

The circumstances under which an antenuptial contract is made import a purpose that it shall confer real rights and impose substantial obligations. It is an implied term of such an agreement that it shall be fairly carried out and that it shall not be performed in hate, trickery, perversity, or distrust. The inference rationally to be drawn from the conditions attendant upon an antenuptial agreement is that it is designed to give something of value to the wife and that it is not an empty form. It is more consonant with the situation to infer that, if the parties intend that power shall be reserved to the husband wholly or in large measure to deprive the wife of property rights by making gifts for that purpose during life and thus leave nothing or much less than might rationally have been expected for the will to operate on, it should be expressed in the instrument, than it is to deduce the reservation of such power contrary to the whole spirit of the instrument and the nature of the transaction. The right secured to the wife by implication is that she shall be treated fairly and rationally in the matter of distribution of his property by the husband by gifts during his life.

The true rule, fairly to be deduced from the weight of authority and resting on sound reason, is that a man, who has entered into an antenuptial agreement with a woman, who becomes his wife, to give her by will a proportional part of his estate, may without breaking his agreement make gifts during his life in good faith and reasonable in amount having regard to all the circumstances,

but he cannot make gifts either absolutely, conditionally, indirectly or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of his wife. The motive in such a case affects the validity of the transaction because it determines "the extent of a privilege to infringe upon the admitted right of another." *Leonard v. Leonard*, 181 Mass. 458, 461. The adoption of any other rule in substance would put it in the power of a husband to strip himself during life of all his property, make his antenuptial agreement a barren instrument and leave his wife penniless. A result like that would be contrary to every inference arising from the relation of the parties and the purpose of an agreement.

The conclusion here reached is somewhat analogous to many classes of cases where equity in the interest of good faith and fair dealing enjoins contrary conduct either by mandate or restraint. For example, prohibition of use of information, acquired through employment, to harm of employer, *Essex Trust Co. v. Enwright*, 214 Mass. 507, *Aronson v. Orlov*, 228 Mass. 1, 5; protection of vendee of good will against setting up of a rival business by vendor, *Old Corner Book Store v. Upham*, 194 Mass. 101, *Foss v. Roby*, 195 Mass. 292, and appropriation of appointed property to payment of debts of appointor, *Shattuck v. Burrage*, 229 Mass. 448, all are equitable doctrines, engrafted on written instruments silent upon the subject, because consonant with fundamental ethical rules of right and wrong.

The findings of fact bring the case at bar fairly within this principle. A court of equity will refuse any relief by injunction upon such facts.

The stipulation signed by the three sons and the persons named in the will as executors, purporting to relinquish some of the preferential rights of the sons in the partnership and agreeing that the interest of the deceased therein may be sold under order of court, has no bearing upon the question whether the antenuptial agreement has been performed by the deceased.

It follows from what has been said that all the plaintiffs' requests for rulings were denied rightly. No error is disclosed on this record.

Exceptions overruled.

MARGARET A. CROWDIS, administratrix, vs. GEORGE B. HAYWARD
& others, administrators.

Middlesex. March 10, 1919. — July 9, 1919.

Present: RUGG, C. J., LORING, DE COUCY, PIERCE, & CARROLL, JJ.

Bills and Notes, Consideration. Practice, Civil, Exceptions, New trial.

At the trial of an issue submitted to the Superior Court upon an appeal by an administratrix from an adverse decree of the Probate Court upon her petition for the allowance of a claim by her, personally, as a creditor against the estate upon a promissory note of the intestate payable to his father and indorsed by the father to the petitioner, the issue being, whether the intestate was indebted to the petitioner upon the note, the petitioner, who had been a member of the household with the father and the son for thirty-two years, first as companion for the mother, then, after her death, as housekeeper for the father and the intestate, and, after the death of the father, as housekeeper for the intestate until his death, testified that the note was signed by the intestate and by the father, that she was present when the note was made and delivered to the father by the intestate, but did not know anything about the consideration for the note and did not know why it was given; that the father and the intestate were talking at the time, but she did not recall the conversation. There was evidence that the intestate had stated that the note did not belong to the petitioner, that "She never saw the note and knows nothing about it," and that it was made for the special convenience of him and his father, and that he was insolvent when the note was made and continued so until his death. *Held*, that the issue was for the jury, and that the judge could not rightly order it answered in the negative.

At the trial above described, the judge, without objection by either party, submitted to the jury a special question as to whether there was a consideration for the note as between father and son, which the jury answered in the affirmative. *Held*, that it was not open to the respondents to contend that the petitioner was not a holder in due course because she knew that there was no consideration between the father and son, and that, in view of the answer of the jury to the special question, such a contention was immaterial.

At the same trial there was evidence tending to show that the consideration for the indorsement of the note to the petitioner was a promise to remain with the father so long as he lived, and the judge charged the jury, subject to an exception by the respondents, "A promise to remain with the family as long as . . . [the father] . . . should live would be sufficient consideration to make the note good in her hands, even though it had been made to . . . [the father] . . . without any consideration, unless . . . [the petitioner] . . . knew that the note was originally made without consideration." *Held*, that the special finding of the jury that there was a consideration for the note as between father and son rendered the exception to the instruction immaterial.

The denial of a motion for a new trial that has reference only to questions of law which might have been raised at the trial is wholly within the discretion of the judge.

APPEAL by the administratrix of the estate of Frank E. Chandler, late of Medford, from so much of the decree of the Probate Court for the county of Middlesex, upon a petition by her for the allowance of certain claims made by her personally against the estate, as disallowed a claim upon a promissory note of Frank E. Chandler, the intestate, payable to Joseph C. Chandler and indorsed by Joseph C. Chandler to the petitioner, for \$25,000 and interest, and a claim, in the sum of \$7,944, upon an account annexed for money lent, services as housekeeper and services as treasurer and general manager of a milk business.

Issues were framed for trial in the Superior Court as follows:

"1. Is the estate of Frank E. Chandler indebted to Margaret A. Crowdis upon the promissory note for \$25,000.00 dated June 1, 1895. . . . and if so, for how much?"

"2. Is the estate of Frank E. Chandler indebted to Margaret A. Crowdis upon the account annexed . . . and if so, for how much?"

The issues were tried in the Superior Court before *Hitchcock, J.* The material evidence is described in the opinion. At the close of the evidence the respondents moved that the jury be ordered to answer both issues in the negative. The motions were denied. Special questions submitted to the jury in connection with the first issue, certain instructions of the judge to the jury excepted to by the respondents, and the answers of the jury to the special questions and to the issues, are described in the opinion. The respondents alleged exceptions.

H. D. McLellan, (C. L. Lovejoy with him,) for the respondents.

O. Storer, for the petitioner.

CARROLL, J. This is a petition by the administratrix of the insolvent estate of Frank E. Chandler, for the allowance of a claim on an account annexed, and a claim upon a negotiable note of the intestate dated June 1, 1895, payable to his father, Joseph C. Chandler, and by him indorsed to the petitioner November 11, 1896. Two issues were framed in this court for the jury. These issues were sent for trial to the Superior Court where the jury

found that the estate of Frank E. Chandler was indebted to the petitioner upon the account annexed, and that the estate was indebted on the promissory note in the sum of \$38,083.33. In connection with the first issue the judge of the Superior Court submitted to the jury the following questions: "Was there any consideration for the note as between Joseph C. Chandler and Frank E. Chandler?" and "Was there any payment of interest made to petitioner, Crowdis, upon the note, by Frank E. Chandler, at any time within six years prior to June 30, 1913?" Both questions were answered in the affirmative. The judge refused to direct the jury to answer in the negative to the two issues framed in the Supreme Judicial Court. No exception was taken to the reference to the jury of the questions submitted by the Superior Court.

The respondents argue that the judge should have directed the jury to find that the estate was not indebted to the petitioner upon the note, because, between the father and son, the note was not based on a sufficient consideration and the petitioner was not a holder in due course.

The petitioner became a companion for Mrs. Joseph C. Chandler in 1881. Mrs. Chandler died in 1888. From that time the petitioner had full charge of the home, — "hired the help, . . . did the ordering" and collected the rents. Joseph C. Chandler, the father, died in 1905, and Frank E. Chandler continued to live in the household, having lived there since 1881 until June 30, 1913, when he died. The petitioner testified that the note was signed by the maker and indorser; that she was present when the note was made and delivered to Joseph C. Chandler by the maker, but did not know anything about the consideration for the note and did not know why it was given to Joseph C. Chandler; that the father and son were talking at the time, but she did not recall the conversation. There was no further direct evidence bearing upon the consideration between the maker and the payee. There was evidence from one witness that Frank E. Chandler said to her that the note did not belong to Miss Crowdis, the petitioner; that "She never saw the note and knows nothing about it. . . . At the time it was made, it was made for a special purpose to suit our convenience," meaning himself and his father."

It was a question of fact whether the note was issued for a

consideration, and the judge could not grant the respondents' motion and direct the jury to find the issue in the negative. The note must be deemed *prima facie* to have been for a valuable consideration. *Burnham v. Allen*, 1 Gray, 496. *Black River Savings Bank v. Edwards*, 10 Gray, 387. The production of the note duly indorsed to the petitioner was some evidence in her behalf. A *prima facie* case was made out, *Huntington v. Shute*, 180 Mass. 371, and it could not be ruled that as matter of law the note was without consideration and that the estate was not indebted to the petitioner upon the note.

Mason v. Gardner, 186 Mass. 515, was an action of contract upon two promissory notes; a ruling directing a verdict for the defendant was upheld. All the material facts were shown. The plaintiff put in evidence the circumstances showing all that was said and done by the promisor in relation to the making of the notes and their custody down to and after her death. It was held upon examination of the whole case, that there was no substantial evidence that the instruments were made upon a valuable consideration and no substantial evidence that they were delivered by the promisor in her lifetime. In the case at bar the facts connected with the making and delivery of the instrument and the consideration moving between the parties are not disclosed; and where all the circumstances do not appear, upon undisputed evidence, it could not be ruled that as matter of law the note was without consideration. See, in this connection, *Duggan v. Bay State Street Railway*, 230 Mass. 370, 378, 379; *Mercier v. Union Street Railway*, 230 Mass. 397, 404.

The declarations of the maker as to his reasons for giving the note to his father, and the fact that he was insolvent in 1895, when the note was made, and continued so until his death, are insufficient to permit the granting of the respondents' motion. There is nothing in *Krell v. Codman*, 154 Mass. 454, in conflict with what is here decided.

The respondents contend that the petitioner was not a holder in due course; that she knew there was no consideration for the note between the maker and the payee, and she did not take the note for value. This question is not open to the respondents and in view of the findings of the jury, it becomes immaterial.

The respondents excepted to that part of the charge where the

judge said: "A promise to remain with the family as long as Joseph C. Chandler should live would be sufficient consideration to make the note good in her hands, even though it had been made to Joseph C. Chandler without any consideration, unless Miss Crowdis knew that the note was originally made without consideration." The jury in answering the questions submitted to them did not pass on the issue raised by this exception; and in view of their express finding that between Joseph C. Chandler and Frank E. Chandler there was a consideration for the note, the exception is now immaterial even if there were an error of law in the statement excepted to, which we do not mean to intimate.

There was no error in denying the respondents' motion for a new trial. The motion had reference to questions of law which might have been raised during the trial. See *Commonwealth v. Morrison*, 134 Mass. 189; *Loveland v. Rand*, 200 Mass. 142.

The exceptions taken to the admission of the evidence and the refusal to direct the jury to answer the second issue in the negative have not been argued, and we treat them as waived.

Exceptions overruled.

FRANK T. HORGAN vs. WILLIAM H. MORGAN & others.

Suffolk. March 11, 1919. — July 10, 1919.

Present: RUGG, C. J., LORING, DE COURCY, PIERCE, & CARROLL, JJ.

Voluntary Association. Trust, Voluntary association. Partnership. Agency, Existence of relation, Scope of authority.

In the shareholder's certificates issued by the voluntary association under a declaration of trust which, in *Frost v. Thompson*, 219 Mass. 360, was held to be a partnership and not a trust, no mention was made of by-laws, but reference was made to the declaration of trust. The declaration was recorded with various public registrars, and it and "by-laws" adopted by the trustees were on file in the office of the organization. An article of the declaration provided that "The Trustees shall have power to employ such attorneys, agents, clerks and a treasurer, and to fix the duties to be performed by them . . . as they may deem expedient." By a "by-law" the trustees gave the treasurer power in the name and behalf of the association to make, sign and indorse promissory notes. One elected as treasurer being obliged to be absent for considerable periods, the trus-

tees elected an acting treasurer and voted that he, "while in said capacity of Acting Treasurer, succeed to all the duties of the Treasurer as defined by the Declaration of Trust and By-Laws." Thereafter such acting treasurer, with the knowledge of the officers and some of the shareholders of the association, signed all contracts, notes, checks and other obligations of the association and indorsed all checks and notes, notes to the amount of between \$200,000 and \$300,000 thus having been signed and indorsed by him in a period of four and one half years, almost all of which had been paid. In an action against all the shareholders of the association upon some of such notes as were unpaid and were made and indorsed while the defendants were shareholders, the defendants denied the authority of the acting treasurer to sign and indorse for the association: *Held*, that the association and the individual shareholders were bound by the acts of the acting treasurer in signing and indorsing the notes in question and that a finding for the plaintiff was warranted.

CONTRACT, as amended, against forty-nine individuals, alleged to be doing business under the name and style of Buena Vista Fruit Company, upon twelve promissory notes dated, ten in January, one in February and one in May, 1915, in eleven of which the Buena Vista Fruit Company was named as payee and on the back of which the name of the payee was indorsed, and one of which purported to be signed by the Buena Vista Fruit Company. Writ dated April 6, 1915.

The action was referred to an auditor. Material facts found by him are described in the opinion. The action was heard by *Morton, J.*, without a jury, upon the notes and the auditor's report as evidence. The defendants asked the judge to rule as follows:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. On all the evidence the plaintiff, if entitled to recover at all, can do so only against the original shareholders who now survive, viz., Carlton, Graves, Dunning and Thompson.

"3. The plaintiff, if entitled to recover at all, can do so only against the defendants, Carlton, Graves, Dunning and Thompson, who were the original shareholders, and the defendants, Hersey, Boyden, Litchfield and Taylor.

"4. None of the defendants are partners in the Buena Vista Fruit Company.

"5. If any partnership exists, it is only between the surviving original shareholders, viz., Hersey, Boyden, Litchfield and Taylor.

"6. None of the defendants, except the original shareholders, are bound by the by-laws later adopted by them, nor by the acts of the acting treasurer under and by virtue of said by-laws.

"7. The burden is on the plaintiff to prove that the defendants, even if they were partners, authorized the signing and indorsing of the notes in suit, and the evidence does not justify a finding to that effect.

"8. The plaintiff, if entitled to recover at all, can do so only upon the notes in which the Buena Vista Fruit Company is maker.

"9. There is no authority shown in Morris to indorse the notes in suit, so as to bind the individual defendants.

"10. If a partnership was created by the declaration of trust, so that the original five shareholders became partners, the mere fact of the remaining defendants purchasing shares of stock in said trust from time to time and receiving therefor certificates such as the one set forth in the auditor's report, did not create a partnership between them, and the original shareholders, in view of the finding of the auditor that it was not the intent of any of them to create such a partnership."

The judge refused so to rule and found as follows: "I find and rule that all of the defendants are partners and are bound by the by-laws and by the acts of Morris, as acting treasurer; that the notice of protest was sufficient and that each of the defendants is liable upon the notes." He found for the plaintiff for the full amount of the notes and interest, \$5,456.83; and the defendants alleged exceptions.

C. A. McDonough, for the defendants.

C. A. Warren, for the plaintiff.

DE COURCY, J. The twelve promissory notes in suit were signed or indorsed "The Buena Vista Fruit Co. Frank E. Morris, Acting Treasurer." This company is a voluntary association under a declaration of trust, dated December 27, 1907; and the defendants are all the residents of Massachusetts who were shareholders when the obligations sued on were contracted. The company received the proceeds of the notes; and the plaintiff purchased them for value and before maturity.

It was decided in *Frost v. Thompson*, 219 Mass. 360, (which was a suit to recover on a promissory note of this same company,) that the Buena Vista Fruit Company is a partnership and not a trust. It is now contended, especially on behalf of forty-one of the defendants who were not either officers or original subscribers, that the authority of the treasurer or acting treasurer to sign or

indorse promissory notes in the name of the company arises out of the provisions of the by-laws only, and that they are not bound by those by-laws.

It is true that the certificates of shares, while referring to the declaration of trust, make no reference to the by-laws; but the former was filed in the office of the city clerk, and with the Secretary of State, and the originals or copies of both the declaration and by-laws have always been on file in the office of the organization. The declaration expressly provides in Article X that "The Trustees shall have power to employ such attorneys, agents, clerks and a treasurer, and to fix the duties to be performed by them . . . as they may deem expedient." Among the powers and duties they prescribed for the treasurer, by one of the "by-laws," was that of making, signing and indorsing promissory notes in the name and behalf of the company. Dunning, the treasurer, became assistant manager of the plantations in Cuba in January, 1911, and manager in 1913, and has been there a considerable part of the time. This rendered it necessary to have an acting treasurer in Boston, and Morris was duly elected as such in January, 1911, and was authorized to sign all notes and other obligations in the name of the company. The trustees further voted "That said Frank E. Morris, while in said capacity as Acting Treasurer, succeed to all the duties of the Treasurer as defined by the Declaration of Trust and By-Laws of the Company."

Since that time Morris is the person who has signed all contracts, notes, checks and other obligations of the company, and indorsed all checks and notes. The auditor finds that: "During the year from July 1, 1914, to July 1, 1915, Mr. Morris indorsed in this way for deposit from six to ten checks each week and drew twenty or twenty-five checks each week. All notes of the organization were signed or indorsed in the same way, and from January 30, 1911, to July 1, 1915, Mr. Morris as Acting Treasurer had signed and indorsed notes to the amount of two or three hundred thousand dollars. All these checks and notes, with the exception of the notes in suit, have been met by The Buena Vista Fruit Company, except in a few instances where funds were not available, and The Buena Vista Fruit Company has paid notes indorsed as are the notes in suit by Mr. Morris

as Acting Treasurer." The officers and some of the other shareholders knew that notes of the company had been signed or indorsed by the acting treasurer, and "an examination of the books would have disclosed the facts, and even casual attention to the affairs of the organization would have disclosed how its business was being carried on." These facts warrant a finding that the company was bound by the acts of the acting treasurer in signing and indorsing these promissory notes, not only by virtue of the express authority given to him under the declaration of trust and by-laws, but also by reason of his course of conduct carried on with the knowledge and implied assent of those managing the business of the company, who held him out to the public as having authority to sign and indorse notes in behalf of the company. *Merchants' National Bank of Gardner v. Citizens' Gas Light Co. of Quincy*, 159 Mass. 505. *Hartford v. Massachusetts Bowling Alleys, Inc.* 229 Mass. 30. *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 581, 582.

It may be that many of these defendants were misled by the appearance and language of the certificate of "non-assessable" "shares of stock" issued by the officers of the company, that they assumed that the company was a corporation, and did not fully realize that they were associating themselves as members of a partnership. But, as the auditor finds, "none of these defendants except the officers paid any attention whatever to the conduct of the business of the organization." They voluntarily adopted the partnership form of association; and their rights and obligations as shareholders are those defined by the established rules of law applicable to ordinary partnerships. *Williams v. Milton*, 215 Mass. 1. *Frost v. Thompson, supra*. *Priestley v. Treasurer & Receiver General*, 230 Mass. 452.

Exceptions overruled.

EDMUND A. WHITMAN, trustee, & another *vs.* BOSTON TERMINAL
REFRIGERATING COMPANY & another.

Suffolk. April 17, 1919. — July 15, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Pledge. Conversion. Damages, In tort. Practice, Civil, Record.

Where, in an agreement pledging certain personal property to secure the payment of a note of the pledgor, it is provided that, in case of bankruptcy of the pledgor, the note shall forthwith become due and payable and the pledgee is empowered "to sell, assign and deliver the whole or any part of said security . . . at public or private sale, without demand, advertisement or notice of any kind, which are hereby expressly waived," and that at such sale the pledgee may purchase the whole or any part of the property pledged, free from any right of redemption on the part of the pledgor, the pledgee, in any sale of the pledged property made upon the pledgor becoming bankrupt, must act in good faith and use every reasonable effort to protect the interest of the pledgor.

If the pledgee, in the agreement above described, is a corporation doing business in Boston, whose entire common stock is owned by a corporation doing business in Springfield, by which it is managed and controlled, and, acting under orders of and in combination with the Springfield corporation, upon the bankruptcy of the pledgor, for the sole purpose of benefiting the two corporations, sells and ships the pledged property to the Springfield corporation at a price below the market price and it is sold by the Springfield corporation within thirty days at a very substantial profit, such a sale to the Springfield corporation may be found to be fraudulent and voidable at the election of the pledgor and to amount to a conversion.

It is not a condition precedent to a right on the part of the trustee in bankruptcy under the circumstances above described to maintain an action of tort for conversion against the pledgee and the Springfield corporation that a tender first should be made to the pledgee of the amount to secure which the pledge was made, since the pledgee had put it out of his power to return the property.

In such an action against the pledgee and a confederate for conversion of the pledged property by a wrongful sale, the plaintiff may recover the fair market value of the pledged property less the amount of the debt for which the goods were pledged.

A bill of exceptions saved by the defendants at the hearing by a judge without a jury of such an action, while it stated that the judge found for the defendants and what he found to be the value of the property at the time of the conversion, did not state the amount of the finding. The plaintiff's counsel in his brief stated that the judge made a deduction of the amount of the debt in making his finding, and, from the amount of the finding stated in the copy of the finding transmitted to this court with the papers in the case and from the fact that the

defendants' counsel did not contend to the contrary, it was *held* that the judge in his finding had deducted the amount of the debt from the amount for which the property should have been sold.

TORT OR CONTRACT, originally by the trustee in bankruptcy of the Mills Tea and Butter Company against the Boston Terminal Refrigerating Company, the first two counts being in tort and the third being in contract, for damages resulting from the alleged wrongful sale by the defendant the Boston Terminal Refrigerating Company of fifteen hundred dozens of eggs and forty-three thousand five hundred and fourteen pounds of butter, pledged to it by the Mills Tea and Butter Company. Writ dated January 24, 1916.

After the entry of the action, the plaintiff was permitted to amend by adding as a party plaintiff the Mills Tea and Butter Corporation, assignee of the claim, and as an additional defendant the Eastern States Refrigerating Company.

Under the circumstances stated in the opinion, the count in contract became immaterial.

The action was heard by *Hall, J.*, without a jury. The alleged wrongful sale by the defendants was made on December 23, 1915. Other material evidence is described in the opinion. At the close of the evidence, the defendant moved that findings be made in its favor. The motion was denied. The defendant then asked for the following rulings, which were given by the judge, the last four being stated by him to have been given "if material":

"3. That the defendant the Boston Terminal Refrigerating Company on said December 23, 1915, was under no duty to sell said butter and eggs at retail or in separate lots."

"6. That under the terms of the notes in suit, it was competent for the defendant the Boston Terminal Refrigerating Company on said December 23, 1915, to sell said butter and eggs to itself at private sale.

"7. That on said December 23, 1915, it was competent for the defendant the Boston Terminal Refrigerating Company to sell said butter and eggs at private sale to the Eastern States Refrigerating Company, a separate corporation, notwithstanding the fact that the latter company had the ownership and control of the common stock of the former company, and thereby controlled its management."

"9. That the plaintiff cannot maintain this as an action in

assumpsit or otherwise for an accounting and payment over of the proceeds of sale, because he has never affirmed said sale, but has at all times claimed that the sale was wrongful, fraudulent, colorable, etc.

"10. In a case like the present, where the pledgee is authorized to purchase the property, and does so at a sale rightfully made, he acquires a good title against the pledgor, and the sale binds the pledgor, and the pledgor can look only to the proceeds."

The following rulings, asked for by the defendant, were refused:

"1. Under the terms of the notes in evidence the defendant the Boston Terminal Refrigerating Company had a clear right to sell and dispose of the entire lot of butter and eggs held as security for said notes, en bloc, and for immediate cash, on said December 23, 1915; meaning that it had a right to clean up the entire transaction on that day.

"2. That the defendant, the Boston Terminal Refrigerating Company on said December 23, 1915, was under no duty to delay said sale because of the dullness of the market, or in order to get a better price."

"4. That under the circumstances of this case, the primary and paramount duty of the defendant the Boston Terminal Refrigerating Company on December 23, 1915, was to protect its loans for the benefit of itself and the First National Bank of Boston, and of the holders of its own paper; and that its duty to the Mills Tea and Butter Company was subordinate and secondary to the duty of protecting its loans.

"5. That on December 23, 1915, the defendant the Boston Terminal Refrigerating Company had the right as aforesaid to sell and dispose of all the said butter and eggs en bloc, for immediate cash on that day, and it was under no duty or obligation to notify the Mills Tea and Butter Company of the said sale, or to demand payment of the notes, or to advertise the sale."

"8. That the plaintiff cannot maintain his count for conversion, because there has not been at any time any tender of payment made of the amount due on the notes in evidence."

"11. In a case like this, the pledgee is not required to exercise the same care, prudence and diligence that a prudent man would in the sale of his own property."

The judge found for the plaintiff in the sum of \$2,904.90, on

the ground that the defendants had converted the butter and eggs, finding the butter worth twenty-seven cents a pound and the eggs twenty-seven cents a dozen in the market on that day. The defendants alleged exceptions.

The case was submitted on briefs.

G. L. Wilson, for the defendants.

E. A. Whitman, trustee, *pro se*.

BRALEY, J. The action is in tort or contract and it is plain that the first two counts in tort rest on a disaffirmance, while the third count in contract is based on an affirmance of the alleged sale of the butter and eggs, the property in controversy. While it does not appear that at the close of the evidence the plaintiff was required to elect, the presiding judge having given the defendants' ninth request that the plaintiff "cannot maintain this as an action in assumpsit or otherwise for an accounting and payment over of the proceeds of sale, because he has never affirmed said sale, but has at all times claimed that the sale was wrongful, fraudulent, colorable, etc." and found for the plaintiff on the ground "that defendants had converted the butter and eggs," the third count calls for no further comment.

The rights of the pledgor, the Mills Tea and Butter Company, of which the individual plaintiff is trustee in bankruptcy, and the Boston Terminal Refrigerating Company, the pledgee, are to be ascertained from the contracts under which the property was delivered as collateral security for the payment with interest of certain promissory notes on demand, given for money lent by the pledgee to the bankrupt. The pledge in each instance provides, that not only on non-payment of the notes, but in case of bankruptcy the notes and all other liabilities of the pledgor shall forthwith become due and payable, and the pledgee is empowered "to sell, assign and deliver the whole or any part of said security . . . at public or private sale, without demand, advertisement or notice of any kind, which are hereby expressly waived," and at such sale the pledgee may purchase the whole or any part of the property sold free from any right of redemption on the part of the pledgor. The pledgee, "a public warehouseman," in accordance with authority expressly conferred by the agreements, rehypothecated for its own debts to a national bank the notes which were overdue and unpaid at the date of bankruptcy; and the pledgee, as it

asserted acting under the power and for the purpose of obtaining money to take up the notes after the pledgor had gone into bankruptcy, transferred and delivered the property to the co-defendant, the Eastern States Refrigerating Company, for an amount paid by draft and check apparently sufficient to liquidate the indebtedness with interest and all lawful charges. The pledgor having defaulted and become a bankrupt, the pledgee under the express terms of the power was not required to give notice to the trustee, or to the bankrupt, or to sell at public auction. *Wilson v. Hawley*, 158 Mass. 250, 253. The right to foreclose having accrued, the pledgee, while bound to get whatever the property was reasonably worth under going market conditions at the time of sale, was not required to wait, and could sell at once even if by prudent delay a better price might have been obtained. *Newsome v. Davis*, 133 Mass. 343, 348. *Clark v. Simmons*, 150 Mass. 357, 359. *Hall v. Paine*, 224 Mass. 62, 72, 73.

But, the issue of fraud having been raised, the defendant's first, second, fifth, and eleventh requests, which omitted all reference to good faith in making the sale, were denied rightly. The judge was warranted in finding on the evidence that the Eastern States Refrigerating Company as owner of the entire common stock, managed and controlled not only the corporation but the commercial dealings of the pledgee; or, as stated in the record, the business was "indirectly operated" by the Eastern States Refrigerating Company. And that after the negotiations for the sale of the butter to the Massasoit Creamery Company fell through, the pledgee, acting under the orders of and in combination with the Eastern States Refrigerating Company, to which the butter had been shipped from Boston to Springfield for delivery to the Massasoit Creamery Company, and for the sole purpose of benefiting themselves, made the transfer of the butter as well as of the eggs, which he further could find was known to the parties to be worth much more than the price obtained. A further finding was warranted that the Eastern States Refrigerating Company, the alleged purchaser, and not the pledgee fixed the price and ordered the property shipped to it.

It was the duty of the pledgee to use every reasonable effort to protect the interest of the pledgor. *Bon v. Graves*, 216 Mass. 440, 446. It could not for its own exclusive benefit, or for the benefit

of its overlord, sell at a price which under the judge's finding was largely below the market price, and which, because of the quantity of butter disposed of, resulted in a very substantial profit to the parties as shown by the prices at which the butter within a period of less than thirty days was resold. The power gives authority only to make a lawful sale. If the sale was found to be fraudulent and therefore voidable at the election of the pledgor, the pledgee, although the lien had not been discharged, was guilty of conversion. It had put itself in a position where it could not redeliver the property on payment of the debt. *Fletcher v. Dickinson*, 7 Allen, 23. *Merrifield v. Baker*, 9 Allen, 29; S. C. 11 Allen, 43. *Fowle v. Ward*, 113 Mass. 548. *Hancock v. Franklin Ins. Co.* 114 Mass. 155. *Hathaway v. Fall River National Bank*, 131 Mass. 14.

The defendants contend that, even if the pledgor after default had not been divested of its general title, it had no right to a return of the property or possession until it tendered payment of the outstanding obligations. See *Harding v. Eldridge*, 186 Mass. 39, 42; *Doyle v. Peerless Motor Car Co. of New England*, 226 Mass. 561; *Beacon Motor Car Co. v. Shadman*, 226 Mass. 570. And by the eighth request the judge was asked to rule "that the plaintiff cannot maintain his count for conversion, because there has not been at any time any tender of payment made of the amount due on the notes in evidence." It is argued that, until the debt is paid off, the pledgee has the whole of the present interest, and that a sale does not entitle the pledgor to bring an action for conversion which assumes the right to immediate possession. *Jarvis v. Rogers*, 13 Mass. 105; S. C. 15 Mass. 389. *Cumnock v. Newburyport Institution for Savings*, 142 Mass. 342, 346.

But a tender is not necessary as a condition precedent where the pledgee, if he acts wrongfully, has put it out of his power to return the property. The pledgor under such conditions may recover the fair market value of the merchandise less the amount of the debt for which the goods were pledged. *Chamberlin v. Shaw*, 18 Pick. 278. *Whitaker v. Sumner*, 20 Pick. 399. *Briggs v. Boston & Lowell Railroad*, 6 Allen, 246. *Fletcher v. Dickinson*, 7 Allen, 23. *Fowle v. Ward*, 113 Mass. 548. *Farrar v. Paine*, 173 Mass. 58. 21 R. C. L., Pledge, § 39, and cases and authorities there collected.

The printed record fails to show that any such deduction was made. The plaintiff's counsel however states in his brief that this course was taken at the trial, and it is apparent from the copy of the judge's finding transmitted with the papers when read in connection with the evidence of value found in the record, and the fact that the statement is not denied by the defendants' counsel, that damages were awarded only for the excess in value of the property over the amount of the debts.

It follows that the eighth request was denied rightly, and, finding no error in the refusal to give the fourth request, that the paramount duty of the Boston Terminal Refrigerating Company "was to protect its loans for the benefit of itself and the . . . Bank . . ., and of the holders of its own paper," while its duty to the pledgor was subordinate, the exceptions must be overruled.

So ordered.

FRANK H. BERGERON, administrator, *vs.* ARTHUR FOREST.

Worcester. October 1, 1918. — July 16, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, &
CARROLL, JJ.

Practice, Civil, Verdict, Exceptions, New trial, Requests and rulings. *Landlord and Tenant*, Landlord's liability in tort to tenant and members of his family, Repairs. *Negligence*, Causing death, Of one controlling real estate, Assumption of risk. *Contract*, Consideration. *Custom. Evidence*, Custom, Presumptions and burden of proof. *Witness*.

Where a declaration in an action of tort contains counts alleging liability of the defendant upon different grounds and the jury return a general verdict for the plaintiff, the verdict, in the absence of other reversible error, must stand if there was sufficient evidence to warrant a finding for the plaintiff upon any count.

Where the owner of a tenement house orally lets to a tenant one floor without any agreement as a part of the contract of letting that he would assume the duty of looking after the condition of the premises as to safety from time to time and of doing whatever is necessary to that end whenever occasion arises, he cannot be held liable for personal injuries suffered by the tenant or a member of his family by reason of a defective condition of the premises let unless he has undertaken to make the repairs and has made them negligently.

If the landlord under the tenancy above described undertakes by a contract with

the tenant to make certain repairs on the premises and makes the repairs negligently, he is liable for injuries resulting therefrom not only to the tenant but to all persons who within the contemplation of the parties were to use the premises under the tenancy.

If the landlord under the tenancy above described undertakes gratuitously to make certain repairs, he is not liable for personal injuries, not resulting in death, caused by ordinary negligence in making the repairs, but only if such injuries result through his gross negligence, and then only to the person with whom he makes the gratuitous undertaking.

If the landlord under the tenancy above described undertakes gratuitously to make certain repairs, and the death of the person, with whom he so undertakes, is caused by ordinary negligence on his part, he is liable, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing such death, but he is not liable for the death of any other person caused under such circumstances by either ordinary or gross negligence on his part.

At the trial of an action by the administrator of the estate of the wife of a tenant, occupying one floor of a tenement house under a tenancy such as above described, against the landlord for causing conscious suffering and death of the wife by reason of a fall in January of a certain year due to the giving way of a railing of a piazza, which, in two counts of the declaration, it was alleged the landlord had undertaken to repair and had repaired negligently, there was evidence tending to show that, during the previous summer, the tenant in the presence of the deceased had said to the son of the defendant that the railing was unsafe and that he would move out if it was not fixed; that the son replied that "he guessed there was no need to move out" and that he would see his father about it; that the following Saturday the son returned and made the repairs; that the son made repairs when told to do so by the defendant and that in August of a year or two before the accident the son had reported to the defendant that the tenant and his family "wanted some work done" and that the defendant then had the son make some repairs. It was conceded that negligence in repairing the railing caused the injury to the tenant's wife, and that the cost of properly repairing the railing was not more than \$2. *Held*, that

(1) A finding was warranted that the son made the repairs upon the railing under the authority of the defendant;

(2) A finding was warranted that the defendant undertook to make the repairs for a consideration, namely, to induce the tenant to continue his occupancy;

(3) That the plaintiff was entitled to go to the jury on the two counts above described because his intestate, the tenant's wife, belonged to the class contemplated by the parties as entitled to use the demised premises.

At the trial above described, there was admitted, subject to exceptions by the defendant, evidence tending to show that throughout the district where the tenement house in question was situated and at the time the premises were let, there was a custom that it was the duty of the landlord to make repairs upon railings of piazzas which were a part of the premises let. *Held*, that the evidence was inadmissible. Following *Conahan v. Fisher*, *ante*, 234.

In the same action there were further counts in the declaration which alleged that the repairs upon the railing of the piazza were made gratuitously by the landlord and that through negligence in making them the railing broke, causing the conscious suffering and death of the tenant's wife. There was, besides the evidence above recited, further evidence that the wife asked the defendant's son

to make the repairs and spoke of the complaint of her husband, that she was present at the conversation, above described, between the defendant's son and her husband and that after the repairs were made, the defendant's son assured her that the piazza was safe. *Held*, that the evidence warranted a finding of a gratuitous agreement by the defendant with the wife to make the repair, lack of which caused her injury.

In the two counts of the declaration last above described, there was no allegation that the injury to the plaintiff's intestate was due to gross negligence of the defendant. No question of pleading was raised. A request of the defendant asked the judge to rule that the plaintiff could not recover unless there was an agreement between the defendant and the deceased wife "to make repairs, negligent making of them and an injury to her in consequence of such gross negligence." The judge instructed the jury that the plaintiff might recover if the defendant "undertook to make repairs in a gratuitous way for the wife, and he assured her the premises were safe after he made them, and she was injured as a result of negligence in making the repairs, even though gratuitously undertaken." *Held*, that the request for a ruling, although not strictly accurate, was sufficient to direct the judge's attention to an important principle of law, that he had misstated that principle, and that harmful error thus was committed.

It appearing that the jury were not asked to consider the custom, above described, in connection with the two counts which relied on a gratuitous undertaking with the wife, it also was *held*, that, ordinary negligence of the defendant being conceded, the one of these two counts of the declaration which alleged negligence of the defendant as the cause of the death of the wife properly was submitted to the jury.

At the trial above described, the defendant was called as a witness by the plaintiff, and, subject to exceptions by the defendant, was asked and was required to answer questions, whether any repairs, done on the premises in question before the accident and after the tenant was there, were done by his authority, whether it was his practice, whenever his son told him that the tenant wanted some repairs, to tell his son to go ahead and make them, and whether, if the son repaired the railing in question, he did it with the defendant's authority. *Held*, that there was no error in permitting such examination.

It also was *held* that, on the evidence above described, it could not be ruled as a matter of law that the plaintiff's intestate assumed the risk of her injury.

In the action above described, the jury found for the plaintiff in a single verdict, general respecting the counts and specifying that they assessed a certain amount of damages for the intestate's conscious suffering and a certain amount for the causing of her death. Because there was no error at the trial as to the count for death caused by negligent performance of a gratuitous undertaking with the intestate, it was *held*, that the finding of the jury and their assessment of damages for causing the death, being general and warranted under one of the pertinent counts, should stand, although there was error at the trial as to the other count on that subject.

It further was *held*, that, because of the error at the trial, above described, which related to both of the counts as to the conscious suffering of the plaintiff's intestate, the defendant's exceptions must be sustained and there must be a new trial confined to those two counts.

TORT for conscious suffering and the causing of the death of Clarice Bergeron, the plaintiff's intestate, through the breaking on January 21, 1916, of a railing surrounding a piazza which was a part of a tenement owned by the defendant in the "Cleghorn" district in Fitchburg, of which the intestate's husband was a tenant at will. Writ dated March 25, 1916.

In the Superior Court the action was tried before *Sanderson, J.* The bill of exceptions stated, "It was conceded that the railing, the breaking of which caused the injuries of the plaintiff's intestate, was at the time of the accident out of repair and that the method alleged to have been adopted preceding the fall to repair this railing, was not a proper method to adopt in order to properly repair the railing and it was not disputed that the cost to properly repair this railing would have been trivial — not more than \$2."

The plaintiff, subject to exceptions by the defendant, introduced evidence to show that there was a custom in "the Cleghorn" — a business and residence section of Fitchburg — whereby in instances of hiring such as has been stated at the time of the hiring and from thence continually, it was the duty of the landlord to make repairs upon railings of piazzas which were a part of the tenement let."

The defendant was called by the plaintiff as a witness. In the course of the examination, and subject to objections and exceptions by the defendant, he was asked the following questions, which he answered as stated:

"Q. So far as you know, any repairs that were done on that tenement, before this accident and after the Bergerons came there, were done by you or your authority? A. With my authority that they have been done. . . .—Q. And that was your practice, wasn't it, that whenever Willie Forest told you that the Bergerons wanted some repairs made in their tenement, you told Willie to go ahead and make them. A. When I thought it was necessary I had it done. . . .—Q. And if Willie Forest repaired the piazza rail by driving nails in it diagonally, this piazza rail on the south side of the house, he did it with your authority? A. Yes, sir; if he did it." Other material evidence is described in the opinion.

At the close of the evidence, a motion of the defendant for a general verdict in his favor and for a verdict in his favor on each

of the counts that finally were submitted to the jury as stated in the opinion was denied. The defendant asked for the following rulings among others:

"26. No valid and binding custom has been proved."

"32. There is no evidence that Willie Forest was authorized as the agent of his father to make any contract, to make repairs or to keep the premises safe for the tenant. There is no evidence that he was an agent of the defendant any further than to collect rents and make such repairs as he might be specifically authorized to make. But there is no evidence that the agency went any further, nor that the son had any authority to bind the defendant, and it cannot be inferred from the evidence that he was authorized to make a contract with the tenant or his wife to keep the premises safe."

"34. The contract of hiring in this case was made by the defendant with Eli Bergeron. This contract, whatever its terms, would not give to Mrs. Bergeron any right of action in contract if broken, or in tort if the defendant undertook to make repairs, made them negligently and she was injured by such negligence. In order to entitle the plaintiff to recover there must have been an agreement between the defendant and Mrs. Bergeron to make repairs, negligent making of them and an injury to her in consequence of such gross negligence. The custom alleged to exist—if the jury find that it did exist—was one of the terms of the contract between Eli Bergeron and the defendant and has no bearing upon this issue raised in the case and must not be considered by the jury."

"36. If the jury find that the expense of repairing the railing was trivial and that the insecure condition of the railing was apparent, it was the duty of the tenant, if he knew of it, or Mrs. Bergeron, if she knew of it, to make those repairs in order to prevent injury, and if the tenant or Mrs. Bergeron did not make these repairs, she assumed all risk there was in using it and the plaintiff cannot recover upon any count."

The above rulings were refused. The judge submitted special questions to the jury, which, with their answers thereto, were as follows:

"1. Did the defendant agree to make repairs on the piazza railing?" The jury answered, "He did."

"2. Did the defendant make repairs on the south railing of the piazza?" The jury answered, "He did."

"3. Were the repairs negligently made?" The jury answered, "They were."

"4. Was the defendant's negligence in making repairs the cause of the injury to Mrs. Bergeron?" The jury answered, "Yes."

"5. Did the defendant have notice of a defective condition in the south railing of the piazza?" The jury answered, "He did."

"6. Did the defendant agree to keep the premises safe for Eli Bergeron and his family?" The jury answered, "He did."

The verdict of the jury was as follows: "The jury find for the plaintiff and assess damages in the sum of \$500 for conscious suffering, \$3,000 for death." The defendant alleged exceptions.

The case was argued for the plaintiff at the bar in October, 1918, before *Rugg, C. J., Braley, De Courcy, Crosby, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices.

J. A. Stiles & M. L. Lizotte, for the defendant, submitted a brief.

J. M. Hoy, for the plaintiff.

RUGG, C. J. This is an action of tort to recover for the conscious suffering and death of the wife of Eli Bergeron, who was a tenant at will of the defendant on the second floor of a three-story house. Connected with and a part of the tenement of Eli was a piazza surrounded by a railing or balustrade, which gave way when the deceased went to empty a teapot over the railing, and she fell to the ground and suffered injuries from which she subsequently died. This action is brought to recover compensation for the conscious suffering and the penalty for the death. The case went to the jury upon four counts. The first two counts alleged a binding contract with Eli Bergeron by the defendant to make repairs upon the railing, an undertaking to repair and a negligent making of the repairs and consequent injury to the deceased. The other two counts declared upon a gratuitous undertaking by the defendant to repair the railing, negligent performance thereof with consequent injury to the deceased, who relied "upon the assurance of the defendant's agent to her that it was safe." There was no allegation of gross negligence.

The verdict was general respecting the counts. Hence, in the

absence of other reversible error, it must stand if there was sufficient evidence to go to the jury upon any count. *Pelton v. Nichols*, 180 Mass. 245.

There is no contention that, as a part of the original contract of hiring the tenement, the parties agreed that, and therefore came into relations whereby, the landlord assumed the duty of looking after the condition of the premises as to safety from time to time and of doing what was necessary to that end whenever occasion arose. Confessedly the rule of *Miles v. Janerin*, 196 Mass. 431; *S. C.* 200 Mass. 514, 516, does not apply to the situation here disclosed.

The rights and obligations of the parties arising from the initial contract of letting the tenement were such as ordinarily attach to landlord and tenant under an oral lease. These rights and obligations are that there was no implied agreement that the demised premises were or would continue to be fit for occupancy. The tenant took them as he found them and there was no duty resting on the landlord to make repairs upon them. *Conahan v. Fisher*, *ante*, 234, where the cases are collected.

Cases like *Means v. Cotton*, 225 Mass. 313, 319, respecting the non-liability of a tenant for permissive waste, have no relevancy to the issues here raised.

The defendant as landlord cannot be held liable unless he has undertaken to make repairs and has made them negligently. (1) If he does this by virtue of some contract with the tenant, whereby during the tenancy either repairs or changes are made in the demised premises, the right of recovery is not limited to the tenant personally but includes all persons who within the contemplation of the parties were to use the premises under the hiring. *Feeley v. Doyle*, 222 Mass. 155, 157. (2) But if the landlord does this gratuitously, he is liable only to the tenant or person with whom he makes the gratuitous undertaking. *Thomas v. Lane*, 221 Mass. 447. *Gill v. Middleton*, 105 Mass. 477. In the first class of cases, that is to say, where the landlord makes repairs under contract, he is liable for ordinary negligence. *Galvin v. Beals*, 187 Mass. 250. In the second class of cases, that is to say, where the landlord makes repairs gratuitously, he is liable only for gross negligence, *Massaletti v. Fitzroy*, 228 Mass. 487, 509, except in those instances where death is caused by such act of

negligence, when, liability for death being wholly statutory, under the terms of R. L. c. 171, § 2, as amended by St. 1907, c. 375, a landlord, as well as others causing the death of a human being by negligence, is subject to the penalty there provided for ordinary negligence. *Brown v. Thayer*, 212 Mass. 392, 397, 398. *Flynn v. Lewis*, 231 Mass. 550. But the class of persons for whose death a landlord may be subject to a penalty is not enlarged beyond the class to whom he is liable for gross negligence in causing conscious suffering, because, as is pointed out in the full discussion in *Thomas v. Lane*, 221 Mass. 447, with ample citation of authorities, there is no duty arising out of a gratuitous making of repairs by a landlord to anybody except to the person or persons with whom the gratuitous undertaking was directly made. There can be no negligence unless there is a duty. Negligence consists in doing or omitting to do an act in violation of a legal duty or obligation due to the person sustaining injury. *Minor v. Sharon*, 112 Mass. 477, 487. *Lebourdais v. Vitrified Wheel Co.* 194 Mass. 341. *Bernabeo v. Kaulback*, 226 Mass. 128, 131. *Mammott v. Worcester Consolidated Street Railway*, 228 Mass. 282, 284. *Savings Bank v. Ward*, 100 U. S. 195, 202, 205. By way of precaution it may be added that, if the landlord does an act of gratuitous repair which creates a situation inherently dangerous, such as the presence of explosives without notice and such like conditions, there may be liability under the principle elucidated with full review of decisions in *Thornhill v. Carpenter-Morton Co.* 220 Mass. 593.

It is conceded that the railing, the breaking of which caused injury to the deceased, was out of repair.

1. We treat first the case presented by the first two counts. There was evidence tending to show in substance that the tenant during the summer of 1915, in the presence of the deceased, said to the son of the defendant that the rail of the piazza, which subsequently caused the injury, was unsafe and that he would move out if it was not fixed, and that the reply was that he "guessed there was no need to move out" and that he would see his father about it; that on the following Saturday the same son returned and made repairs upon the piazza and railing. As to the authority of the son to make these repairs, there was considerable evidence to the effect that this son made repairs when

told to do so by his father, and that before the accident, in August, 1914 or 1915, this son had reported to his father that "the Bergerons . . . wanted some work done" and that he had authorized the son to make some repairs. There was much conflicting testimony and a contrary finding well might have been made. This was enough, however, to warrant a finding that the repairs to the railing were made by the son with the authority of the defendant, and that the reason for making the repairs was to induce the tenant to continue his occupancy of the premises, and thus that it was not a case of gratuitous repairs but of repairs made for a consideration. The construction sought to be put upon the testimony by the defendant is too narrow. The case is distinguishable from *Rolfe v. Tufts*, 216 Mass. 563, and also from *Kettleman v. Atkins*, 229 Mass. 89, relied on by him. There was evidence that the repairs were made negligently and that this was the cause of the injury to the deceased. Upon this aspect of the case the plaintiff was entitled to go to the jury, because the wife of the tenant belonged to the class contemplated by the parties as entitled to use the demised premises. The case comes within the authority of *Feeley v. Doyle*, 222 Mass. 155.

There was, however, error in the trial respecting these two counts. Evidence of an alleged custom of landlords to make repairs similar in kind to that held inadmissible in *Conahan v. Fisher*, ante, 234, was admitted at the trial. It was pertinent to those two counts. It may have been the basis of the finding of the jury rather than the evidence to which reference has been made as sufficient to carry the plaintiff to the jury on those counts. Since there is no way of knowing whether the jury based their verdict solely on the competent evidence, the exceptions so far as concerns these two counts must be sustained. The custom in the case at bar is indistinguishable in nature from that held to have been rightly excluded in *Conahan v. Fisher*, ante, 234, where the question is discussed at large. For the reasons there pointed out, *Shute v. Bills*, 191 Mass. 433, affords no authority for the admission of such evidence.

2. We pass to the consideration of the last two counts. There was evidence sufficient to warrant a finding of gratuitous repairs made by the defendant to the tenement of Eli Bergeron, who was

the tenant and the husband of the deceased. As has been pointed out, that is not sufficient to make out a case for the plaintiff.

But there was additional evidence sufficient to support a finding of an undertaking with the deceased herself to make gratuitous repairs through the agency of the son of the defendant, whose authority in the premises has already been discussed. There was evidence to the effect that the deceased made request of the son of the defendant for the making of repairs on the piazza, that she spoke of the complaint of her husband of the unsafe condition of the piazza, that she was present and participated in the conversation with the defendant's son when the statement was made by her husband that the tenement would be vacated and "we would move out," if the repairs on the piazza were not made, and that after the repairs were made the son of the defendant assured her that the piazza was safe. The defendant testified that his son reported on one occasion before the accident, "that he had been down to the Bergeron house and collected rents from the Bergerons and they wanted some work done; they want some repairs done; I told Willie to make the repairs that were asked." Although the case is close upon this point, we are of opinion that this was sufficient to warrant a finding of a gratuitous agreement with the wife. *Gill v. Middleton*, 105 Mass. 477. *Thomas v. Lane*, 221 Mass. 447, 451.

There was no allegation of gross negligence in making the repairs. But no question of pleading appears to have been raised in this connection. The defendant asked for an instruction to the effect that the plaintiff could not recover unless there was an agreement between the defendant and the deceased "to make repairs, negligent making of them and an injury to her in consequence of such gross negligence." This was not correct as to the death count, but it was sound as to the count for conscious suffering. It was enough to call the attention of the judge to the matter of gross negligence. He, however, made no distinction in his charge and instructed the jury that the plaintiff might recover if the defendant "undertook to make repairs in a gratuitous way for the wife, and he assured her the premises were safe after he made them, and she was injured as a result of negligence in making the repairs, even though gratuitously undertaken she may recover unless you find she was not in the exercise of due care."

In this there was error. As the judge should have drawn the distinction between the degree of negligence which would warrant recovery between the count for death and for conscious suffering, that point must be sustained. Even though the request was not strictly accurate in the general form in which it was presented, it was sufficient to direct the consideration of the judge to an important principle of law not adverted to in the charge, an omission which well may have resulted in harm to the defendant. *Bride v. Clark*, 161 Mass. 130. *Yancey v. Boston Elevated Railway*, 205 Mass. 162, 172. *Gascoigne v. Cary Brick Co.* 217 Mass. 302, 305.

There was evidence of ordinary negligence in making the repairs which required the submission of the death count to the jury. There was no error in the instruction so far as this count was concerned. The error in admitting evidence as to custom which already has been pointed out is not material upon the counts for negligence in performance of a gratuitous undertaking to repair. A fair construction of the charge shows that the jury were not misled in this respect, and that the evidence as to custom was confined to the counts referring to repairs made by virtue of a contract.

3. There was no error in the examination of the defendant called as a witness by the plaintiff. *Taylor v. Schofield*, 191 Mass. 1. *Smith v. Boston Elevated Railway*, 208 Mass. 186.

4. It could not have been ruled as matter of law that the plaintiff's intestate assumed the risk. So far as that differs from want of due care in a case like the present it was an affirmative defence and the burden of proving it rested upon the defendant. *Leary v. William G. Webber Co.* 210 Mass. 68. It rarely can be ruled as matter of law that this burden of proof has been sustained. *McDonough v. Metropolitan Life Ins. Co.* 228 Mass. 450, and cases there collected. The case at bar does not fall within any of the exceptions to that rule.

The result is that there can be recovery for the amount found by the jury on the last count, which is for the death. The finding of the jury is to stand in this respect. This disposes also of the second count, which is for death based upon negligence in the performance of a contract with Eli, the husband of the deceased. The counts for conscious suffering and for death are essentially different in their nature and are combined for convenience in one action. *McCarthy v. William H. Wood Lumber*

Co. 219 Mass. 566. The exceptions must be sustained as to the counts for conscious suffering and the new trial is to be confined to those counts. St. 1913, c. 716. *Simmons v. Fish*, 210 Mass. 563.

So ordered.

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AUBERT J. FAY & others vs. JAMES F. CORBETT & another, administrators, & another.

Middlesex. January 15, 1919. — July 30, 1919.

Present: RUGG, C. J., LORING, BRALEY, & CROSBY, JJ.

Equity Pleading and Practice, Master: report of evidence, exceptions to report; Decree, Appeal. *Evidence*, Extrinsic affecting writings.

A suit in equity was referred to a master under a rule directing him "to hear the parties and their evidence, to find the facts and report the same to the court, together with such portions of the evidence as he thinks may be necessary to enable this court to pass upon any question of law raised and reported." After the master had furnished the parties with copies of his report, the plaintiff for the first time asked the master to report all the evidence before him, and, the master refusing to do so, he moved, after the report was filed, that certain portions of the evidence, not reported by the master, be reported. The motion was denied. *Held*, that the denial of such motion was within the discretion of the court.

Where, after a hearing of the plaintiff's exceptions to a master's report in a suit in equity, an interlocutory decree is entered overruling the exceptions and confirming the report, from which no appeal is taken, and a final decree then is entered dismissing the bill, from which the plaintiff appeals, the exceptions to the report cannot be considered, under R. L. c. 159, § 26, if it does not appear that the final decree is erroneously affected by the interlocutory decree.

From the findings, without a report of the evidence, by a master to whom was referred a suit in equity to compel the return to the plaintiff of certain shares of the capital stock of a corporation, which, it was alleged, the plaintiff had transferred to the defendant under the provisions of an oral contract for the financing of the corporation, which the defendant was alleged to have broken, it appeared that there was no such oral contract as that alleged by the plaintiff, that there was a contract made in writing for the financing of the corporation, the consideration for which was the transfer to the defendant of the shares which the plaintiff was seeking to recover, that the plaintiff did not contend that any fraud was practised upon him by the defendant or that there was any mistake on his part when he signed the contract, that the plaintiff was not misled nor deceived by the defendant, that the contract was not unconscionable nor extortionate, and that the defendant did all that he was "called upon to do by the terms of the agreement and much more." *Held*, that the findings, in the absence of a report of the evidence, were not open to review on appeal; and that a decree dismissing the bill must be affirmed.

At the hearing of the suit above described, oral evidence, tending to show that the actual consideration for the making by the defendant of the agreement in writing above described was the transfer to the defendant by the plaintiff of the shares of stock which the plaintiff by the suit was seeking to have returned to him, was held to be admissible, where the agreement made no statement whatever as to the transfer of those shares, but mentioned only certain shares which were transferred to the defendant as collateral.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 17, 1914, seeking to compel the return to the individual plaintiffs of certain shares of the stock of the plaintiff the Carleton and Hovey Company, alleged to have been transferred to the defendant under the provisions of an oral contract as to the financing of that corporation, which the defendants were alleged to have broken.

The suit was referred to a master under a rule described in the opinion.

The agreement in writing ("Exhibit A") of July 23, 1904, was as follows, the testimonium clause and signatures being omitted:

"Agreement made this twenty-third day of July A. D. 1904, by and between Aubert J. Fay and Edgar L. Fay, both of Lowell in the County of Middlesex and Commonwealth of Massachusetts, hereinafter called parties of the first part, and John C. Burke and James F. Corbett both of said Lowell, hereinafter called parties of the second part, witnesseth: —

"Whereas said parties of the first part constitute the majority and principal stockholders of the Carleton & Hovey Company, a corporation duly organized under the laws of the State of New Jersey and having its principal place of business in said Lowell, and are desirous of obtaining additional financial aid for said Company; and

"Whereas said parties of the second part have rendered and are about to render to said Company and to said parties of the first part, directly or indirectly, financial assistance as aforesaid.

"Now, therefore, in consideration of the premises the said parties of the first part have this day transferred to said parties of the second part, each 2760 shares of the preferred stock (Certificates numbered A 104 and A 105) and 4135 shares of the common stock (Certificates numbered 118 and 119) of said Carleton & Hovey, they the said parties of the second part to hold said stock as collateral. And said parties of the second part hereby

agree themselves to hold said stock as collateral as aforesaid but strictly in accordance with the terms of this agreement and subject to the terms of any subsequent agreement which may be made by and between the parties hereto and which by consent of the parties hereto may be considered as a part of these presents.

"Said parties of the second part further agree in the absence of default on the part of the parties of the first part to hold said stock but solely for the benefit of the said parties of the first part to account to the parties of the first part for all dividends declared upon said stock and for any other profits accruing to them as holders thereof. And said parties of the second part further agree at the termination of this agreement to transfer said holdings to said parties of the first part or their legal representatives or to any other person or persons by them properly designated. Said parties of the first part further agree during the existence of this agreement to devote their entire care and attention to the services of said Carleton & Hovey Company but without compensation other than that which may accrue to them as stockholders therein. Said parties of the first part also agree that the sum of money to be expended in any one year in the conduct of the company's business shall not without consent in writing of all parties hereto be in excess of the amount to be hereinafter provided for in a subsequent agreement.

"Said parties of the second part agree to continue the present management of the company's business so long as said management adheres strictly to the terms of this or any subsequent agreement.

"Said parties of the first part further agree not to operate in any new territory or to make any additional advertising contracts without the consent in writing of all parties to these presents.

"And it is further agreed that upon the reorganization of the Carleton & Hovey Company that the present proportional interest of each party shall be preserved. Said parties of the first part also agree to furnish upon request upon all notes to be signed by said parties of the second part in pursuance of this agreement in addition to the name of Carleton & Hovey Company and their own personal signatures, the signature of Fay Bros. & Hosford. It is further agreed that the credit to be afforded shall not for the present exceed twenty-five thousand dollars and hereafter shall

not exceed the sum to be named in a subsequent agreement to be hereafter executed by and between the parties hereto.

"It is agreed that the subsequent agreement herein referred to shall be made and executed not later than three months from the date hereof. It is hereby agreed that in the event of failure to agree upon all the terms of the proposed subsequent agreement heretofore referred to, that either party may after a lapse of ten days from the date of said failure terminate this contract forthwith. And said parties of the first part hereby agree to pay to said parties of the second part as liquidated damages the sum of ten thousand dollars within thirty days thereafter, and will release or cause to be released the said parties of the second part from all liability as endorsers or otherwise incurred in consequence of this agreement. And said parties of the second part in that event agree to re-transfer to said parties of the first part their entire holdings of stock in said Carleton & Hovey Company."

Findings of the master as to this contract were as follows:

"Previous to July 23, 1904, neither Mr. Burke nor Mr. Corbett was the owner of stock in the company. On July 23, 1904, one hundred and twenty-five shares of preferred stock and one thousand four hundred and thirty-seven shares of common stock were transferred into the name of John C. Burke, and one hundred and twenty-five shares of preferred stock and one thousand four hundred and thirty-eight shares of common stock were transferred into the name of James F. Corbett. This stock came from A. J. Fay's holdings and represented a quarter interest in the company, and according to the plaintiffs, was given in consideration of the alleged oral agreement to finance the company and, according to the defendants, was given in consideration of the execution and fulfilment of the terms of the written contract of July 23. For the purposes of the case, it is called the compensation stock. On the same day, July 23, 1904, there were handed to Messrs. Burke and Corbett certificates representing two thousand seven hundred and sixty shares of preferred and four thousand one hundred and thirty five shares of common stock. The certificates were indorsed in blank for transfer by their owner, Aubert J. Fay, but were never transferred on the books of the company. For the purposes of the case, this stock is called the collateral stock. By using the collateral stock, Messrs. Burke and Corbett could

dictate the management of the company as it constituted, with the compensation stock, a majority of both classes of stock, and, if transferred into their names, would give them the voting control of the company.

"The collateral stock was demanded by and given to Messrs. Burke and Corbett solely for the purpose of giving them the voting control of the company. It had no value as collateral for loans and was not intended to be used for that purpose. . . .

"The compensation stock was not the consideration for an oral agreement, but was the consideration for the written agreement which was executed on the day the stock was transferred. . . .

"The proposed subsequent agreement mentioned in the agreement of July 23, 1904, was never thereafter requested or suggested by either of the parties, and no such agreement was entered into." The "collateral stock" all was returned to the plaintiff.

Other findings of the master which are material to this decision are described in the opinion. Objections of the plaintiff to the report, numbering thirty-one, covered twenty printed pages of the record.

The motion of the plaintiff for a report by the master of certain evidence, described in the opinion, and exceptions of the plaintiff to the master's report were heard by *Pierce, J.* He denied the motion and by his order an interlocutory decree was entered overruling the exceptions and confirming the report, from which the plaintiffs did not appeal. Later a final decree was entered dismissing the bill, from which the plaintiffs appealed.

S. L. Whipple, (*A. Lincoln* with him,) for the plaintiffs.

B. B. Jones, for the defendants.

CROSBY, J. This is a bill in equity wherein the plaintiffs seek to have returned to them certain shares of preferred and common stock of the Carleton and Hovey Company, — one of the plaintiffs named in the bill, — which stock was issued to the defendant Corbett and to John C. Burke, now deceased.

The plaintiffs also seek to recover damages alleged to have been suffered by reason of the failure of Burke and Corbett (hereinafter referred to as the defendants) to perform the terms of an alleged oral agreement. The Lowell Trust Company, as pledgee of the stock delivered to Burke, also is joined as a defendant. The ground for the relief prayed for is the alleged failure of Burke and

Corbett to furnish the corporation with all the capital required to finance its business under the terms of the alleged oral agreement, whereby the defendants were to furnish such capital and as compensation therefor were to have the shares of stock in question.

It also is alleged that as a part of the oral agreement the defendants were to advance in the first instance not more than \$25,000; and, in accordance with such advancement, a preliminary agreement in writing dated July 23, 1904, was entered into by the parties (a copy of which is annexed to the bill and marked "Exhibit A"). This agreement provided that the defendants were to furnish a credit which "shall not for the present exceed twenty-five thousand dollars and hereafter shall not exceed the sum to be named in a subsequent agreement to be hereafter executed by and between the parties hereto;" and that the subsequent agreement referred to should be executed within three months from July 23, 1904, and failing to do so either party had a right to terminate the agreement, in which event the plaintiffs were to pay the defendants \$10,000 and to release them from liability on notes given to raise the required capital, and the defendants were to transfer the stock so held by them to the plaintiffs together with certain other shares in the plaintiff corporation which were to be transferred to the defendants as collateral.

The bill states that it was agreed that the alleged oral agreement was not to be superseded or abrogated by the written contract; that the defendants furnished capital only to the amount of \$41,000, which has since been paid by the plaintiffs; that the defendants have been released from liability on account of the obligations thereby incurred; that the collateral stock has been returned by the defendants to the plaintiffs; and that by reason of the defendants' refusal to furnish the full amount of capital required under the terms of the alleged oral agreement the corporation has suffered damages estimated at \$300,000.

It is the contention of the defendants that there was no agreement between the parties other than the written contract of July 23, 1904, which was entered into by the defendants at the solicitation of the plaintiffs; that they were induced to make this contract by reason of the false representations of the individual plaintiffs respecting the financial condition of the corporation; that the defendants furnished the plaintiff company capital to the

amount of \$57,000 by guaranteeing and indorsing notes which were discounted at different banks; that in 1905 it was mutually agreed between the parties that the defendants should not be required to furnish additional financial assistance to the plaintiffs and should not be entitled to receive from them the sum of \$10,000 mentioned in the written agreement and that the plaintiffs should not ask for a return of the compensation stock.

The case was referred to a master to whose report the plaintiffs filed thirty-one objections and saved an equal number of exceptions based thereon. After the master had furnished to each of the counsel a draft of his proposed report, the plaintiffs for the first time requested him to report all the evidence, and to annex to the report certain exhibits. The order of reference to the master was "to hear the parties and their evidence, to find the facts and report the same to the court, together with such portions of the evidence as he thinks may be necessary to enable this court to pass upon any question of law raised and reported." Under this order the master was authorized and required to report only such portions of the evidence as in his judgment were necessary to enable the court to decide any question of law raised on the record. *Parker v. Nickerson*, 137 Mass. 487. *Bowers v. Cutler*, 165 Mass. 441. He was not required to annex to the report the exhibits as requested by the plaintiffs.

At the hearing before a single justice, the motion of the plaintiffs that the master be required to report certain portions of the evidence was denied. It was entirely within his discretion to order the evidence or any part of it reported. *Bowers v. Cutler*, *supra*.

After a hearing on the plaintiffs' exceptions the single justice filed a memorandum in which he stated the grounds and reasons for his decision, and entered an order that the exceptions be overruled and the report confirmed; thereafter an interlocutory decree was entered to that effect. No appeal was taken from the decree overruling the exceptions and confirming the report. We have examined carefully the objections upon which the exceptions are founded, and which need not be recited, and are of opinion that the exceptions cannot be considered under R. L. c. 159, § 26, as it does not appear to us that the final decree is erroneously affected by the interlocutory decree overruling the exceptions and

confirming the report. *Burnett v. Commonwealth*, 169 Mass. 417. Although the plaintiffs did not appeal from the decree overruling the exceptions to the report, it was open to them on this appeal from the final decree to argue on the facts found by the master that the decree is not warranted. *French v. Peters*, 177 Mass. 568. *Lyons v. Elston*, 211 Mass. 478.

The only evidence reported by the master relates to the interview had in July, 1905, between the plaintiffs and the defendant Corbett. Upon an examination of this evidence we are satisfied that the findings based thereon, in view of the other findings, were not unwarranted. The other findings, made upon evidence which is not reported, are conclusive.

It appears from the report that the written agreement of July 23, 1904, was the only agreement made by the parties; that the stock delivered to the defendants, which the plaintiffs seek to recover, was the consideration for the agreement; that at the time it was entered into the Carleton and Hovey Company was in an insolvent condition and the stock then had only a speculative value; that the defendants came to the assistance of the plaintiffs at their earnest solicitation; that the plaintiffs were not misled nor deceived by the defendants; that there was no claim on the part of the plaintiffs that any fraud had been practised upon them by the defendants or that there was any mistake on their part when they signed the written agreement and that it was not unconscionable nor extortionate. The master further finds that the defendants "did all they were called upon to do by the terms of the agreement and much more." In view of these findings and other findings which need not be recited, it is manifest that they are not open to review since the evidence is not before us. *Kennedy v. Welch*, 196 Mass. 592, 594. *Schneider v. Hayward*, 231 Mass. 352.

The case at bar falls within the class where the actual consideration for an agreement may be shown by oral evidence, *Ely v. Wolcott*, 4 Allen, 506, *Way v. Greer*, 196 Mass. 237, and cases collected at page 245, and is plainly distinguishable from cases like *Goldenberg v. Taglino*, 218 Mass. 357, and *Glackin v. Bennett*, 226 Mass. 316.

As we find no error of law the decree must be affirmed, with costs.

So ordered.

HAMPDEN RAILROAD CORPORATION vs. BOSTON AND MAINE
RAILROAD.

Hampden. March 21, 1919. — June 24, 1919.

Present: RUGG, C. J., LORING, DE COURCY, CROSBY, & CARROLL, JJ.

Railroad, Contract to lease. Contract, Validity.

In an action by one railroad corporation against another for the alleged breach of a so called "Agreement for Lease" under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, by the refusal of the defendant to take a lease of the railroad of the plaintiff, by the agreement sued upon the defendant covenanted "to execute the lease, a draft of which is hereto attached . . . as the same may be modified by the Railroad Commission of Massachusetts." The plaintiff covenanted to lease its railroad to the defendant "subject to the approval of the Board of Railroad Commissioners, of Massachusetts, upon terms and conditions as set forth in a draft of lease hereto attached . . ., such lease to be modified in such particulars as the Board of Railroad Commissioners may require." A petition for approval of the lease was filed by the plaintiff but no action was taken on it by the commissioners. *Held*, that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained.

CONTRACT by the Hampden Railroad Corporation against the Boston and Maine Railroad for alleged breach of an alleged contract in writing dated September 5, 1911, to lease the railroad of the plaintiff to the defendant. Writ dated July 1, 1914.

In the Superior Court the case was tried before *Aiken*, C. J. The material facts are stated in the opinion. The "Agreement for Lease" described in the opinion was admitted in evidence subject to the defendant's exception. At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. Parker & R. G. Dodge, (*H. S. Davis* with them,) for the plaintiff.

G. L. Mayberry, (*L. A. Mayberry & J. M. Hallowell* with him,) for the defendant.

RUGG, C. J. This is an action to recover damages for breach

of a written contract executed under date of September 5, 1911, whereby the defendant agreed to take a lease of the railroad of the plaintiff. The certificate of establishment of the plaintiff as a railroad corporation was dated June 2, 1911. When the contract was made the plaintiff had a charter and locations and was authorized to build its railroad, but no construction work had been done. The idea of the Hampden railroad originated with one Mellen, at that time the president of both the New York, New Haven, and Hartford Railroad Company and the Boston and Maine Railroad, and was fostered by him in furtherance of his conceptions as to the mutual advantage of these two corporations. The Hampden railroad connected with tracks of the Boston and Maine Railroad system, but not with tracks of the New York, New Haven, and Hartford Railroad system. Its construction was not undertaken by the Boston and Maine Railroad directly because of its financial limitations. Accordingly the financing and building of the Hampden railroad was undertaken by an independent corporation, whose promoters were aided actively by Mellen. The object of the Hampden railroad was to connect the Central Massachusetts Railroad, a line leased to the defendant, with the New York, New Haven, and Hartford Railroad at Springfield and thus make a through route from New York to the North Station of the defendant in Boston. The locations of the Hampden railroad as prescribed by public authority consisted of a main line about twelve miles long, starting near Bondsville in Palmer, where connection was to be made with the tracks of the Central Massachusetts Railroad, extending through Belchertown and Ludlow to a point in Chicopee, whence one line ran about four miles, connecting with other lines of the defendant at Chicopee Falls, and another line ran about two and one half miles to Athol Junction in Springfield, connecting with tracks of the Boston and Albany Railroad, with which corporation arrangements were made so that interchange of traffic could be made with the New York, New Haven, and Hartford system at Springfield. The contract, which was entitled "Agreement for Lease," contains among others the following covenants to be performed by the plaintiff:

"First: that it will begin forthwith to construct its railroad beginning at a point about one and a half miles east of the station of Bondsville on the Southern Division of the Boston and Maine

Railroad, in the town of Palmer, thence running through the towns of Belchertown and Ludlow, to connect with the Chicopee Falls Branch of the Boston and Maine Railroad, in the City of Chicopee, and, when requested by the Boston and Maine Railroad, also to connect with the Athol Branch of the Boston and Albany Railroad in the city of Springfield."

"Third: that when completed it will lease said railroad to the Boston and Maine Railroad, subject to the approval of the Board of Railroad Commissioners of Massachusetts, upon terms and conditions as set forth in draft of lease hereto attached and made a part of this Agreement, such lease to be modified in such particulars as the Board of Railroad Commissioners may require."

The plaintiff agreed to build the railroad "to the satisfaction of the Boston and Maine Railroad." The agreement further provided that the cost should be the amount which the vice president and general auditor of the defendant should certify to be its cost, and that its cost should be paid by the issuance of stocks and bonds in such amounts, and the latter to bear such rate of interest, as the defendant might determine. The covenant of the defendant was "to execute the lease, a draft of which is hereto attached . . . , or as the same may be modified by the Railroad Commission of Massachusetts." The agreement for lease was signed for the defendant by Mellen, then its president. The negotiation for the lease had been previously authorized by vote of its stockholders and directors. The agreement was ratified by vote of its stockholders in October, 1911. At the time the agreement for lease was made, no part of the plaintiff's railroad was built, but construction was begun in the autumn of 1911 and the line was completed in 1913 from Bondsville to Athol Junction. Mellen, the president of the defendant, gave specific directions in 1912 that no work be done on the line to Chicopee Falls, but that the line to Athol Junction be built first. The plaintiff and the officers of the defendant agreed upon \$3,600,000 as the fair cost of the construction of the Hampden railroad, so far as completed. The plaintiff filed its petition with the railroad commissioners for approval of a lease in September, 1912. No action has been taken on this petition. The plaintiff in 1913, having been theretofore authorized to issue stock to the amount of \$1,400,000, filed with the commissioners its petition for approval of an issue

of bonds to the amount of \$2,500,000. After several hearings, during the progress of which the plaintiff and officers of the defendant agreed upon \$3,600,000 or thereabouts as the cost of constructing the plaintiff's railroad so far as built, the commissioners rendered a decision to the effect that \$1,900,000 in bonds might be issued upon condition that within a reasonable time evidence should be presented to the commissioners that the plaintiff corporation was released from all liabilities, except its capital stock, in excess of that amount. This in substance was a decision that the fair cost of the railroad had been \$3,300,000, that is, the amount of the capital stock and the authorized issue of bonds. In the summer of 1913 Mellen ceased to be the president of the defendant and his successor and its directors declined to go forward with the lease. The question of ratifying the lease signed by Mellen came before the directors of the defendant and a vote was adopted to the effect that there was no occasion to do anything about a lease because the Hampden railroad was not completed. Neither the contract nor the lease ever has been approved by the public service commission.

A railroad corporation has no inherent or implied power to lease its property. It can only do so when and to the extent and in the manner authorized by the State. *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. *Middlesex Railroad v. Boston & Chelsea Railroad*, 115 Mass. 347.

It is enacted by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, respecting "Two railroad corporations, which are incorporated under the laws of this Commonwealth, and whose railroads enter upon or connect with each other," that "any such corporation may lease its railroad to any other such corporation; . . . Such leases shall be upon such terms as the directors agree, and as a majority in interest of the stockholders of both corporations at meetings called for the purpose approve, subject to the provisions of section sixty-seven of Part I of this act." That section, to which reference thus is made, provides that "A lease . . . of the franchise and property of a railroad corporation . . . shall not be valid or binding until the terms thereof shall, after public notice and hearing, have been approved by the board of railroad commissioners," (now the public service commission).

It is obvious that the statute makes no express provision for

the approval by the public service commission of contracts between railroad corporations to enter into leases. No such approval was sought or given to the contract for lease here in issue. It is plain also that the contract for lease did not attempt to bind the parties to the form of lease thereto annexed. The parties were not legally competent under the statute to bind each other to that or to any form of the lease. The only thing which can have binding force under the statute is a lease approved by the public service commission. In the nature of things all that can be done before that approval is obtained is an agreement to make such an agreement as will meet the approval of the public service commissioners. The parties did not attempt to do more than stipulate that they would execute the lease, draft of which was annexed to the agreement for lease "to be modified in such particulars as the Board of Railroad Commissioners may require," or "as the same may be modified by the Railroad Commission of Massachusetts." This agreement for lease was in terms an agreement to make such a lease as might be approved by the commission after a hearing. The authority vested in the public service commission is to approve terms agreed upon by the parties, not to settle the terms of a lease for the parties. Such an approval is not an idle form or a perfunctory ceremony. One manifest purpose of the General Court in providing that no lease of a railroad shall be valid or binding until approved by a public board was to prevent the inclusion of provisions hostile to the interests of the State or the omission of covenants for the protection of the public welfare. It involves a critical examination of the nature of the property to be leased and all the conditions of the lease, to the end that the general public as well as other interests may be fairly dealt with and adequately protected. It is within the plain purview of the statute to prevent extravagance of expenditure by the lessee in paying an excessive rental and thus preventing the diversion of corporate assets which otherwise might be expended for improving facilities for the service of the public and in reduction of rates.

The draft of lease annexed to the agreement for lease is comprehensive in its scope. It contains ten paragraphs covering the whole field of the subject matter. It is framed in general along the lines of leases heretofore approved under the statute. There

is, however, no general form of railroad lease recognized by the statute or established by the commission so far as shown by this record. The aim of the statute is that each lease shall protect the interests involved by such special provisions as the particular needs of each situation may seem to require. There can be no question as to the duty or power of the commission to approve only such terms of any lease as the exigencies of the special facts and circumstances of each case may demand. Two railroads are not in the position of two parties who have full natural power to contract and require only the assent of some person or body to the validity of their agreement. Railroads have power to deal with the subject of a lease by one to the other only according to the permission of the statute. It is an essential prerequisite to the validity of any bargaining between them respecting a lease that the approval of the public service commission be secured. If that is wanting there is no binding force in their negotiations. Whatever might be said about the power of the two contracting railroad corporations to fix the terms of the lease, it is plain that they possessed no authority to bind the public service commission. The freedom of action of that board in the premises was bounded and limited only by the requirements of the public interests. The terms of the lease in every respect could not be valid or possess binding force until approved by that board. If the draft of lease should turn out not to be satisfactory to the public service commission, it would have to be modified and changed until as a whole it was approved by that commission.

The essence of the contract here in suit, therefore, was an agreement to enter into such a contract, that is to say, such a lease, as the public service commission might approve. As has been pointed out, neither the railroad corporations nor the public service commission have authority to that end. That is in substance an agreement to be bound by a contract the obligations of which are to become effective only when, subject to alterations, it may meet the approval of other persons. The plan for the lease was not and could not in the nature of things be completed until so approved. There was no finality about the matter until such approval. Of necessity under the statute the lease was provisional until such approval. The agreement for lease in its last analysis was to enter into a lease upon such terms as were

satisfactory to the public service commission, which terms if different from those in the draft should be subsequently agreed upon by the directors of each corporation and ratified by the stockholders of each.

It was said in *Lyman v. Robinson*, 14 Allen, 242, 254, quoting from *Ridgway v. Wharton*, 6 H. L. Cas. 238, 305, that "An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain." *Sibley v. Felton*, 156 Mass. 273. *Freeland v. Ritz*, 154 Mass. 257. *Woods v. Matthews*, 224 Mass. 577. *Winn v. Bull*, 7 Ch. Div. 29. *Kent Coast Railway v. London, Chatham & Dover Railway, L. R.* 3 Ch. 656, 664, 665. This principle of law governs the case at bar. It is an immaterial circumstance that the parties have agreed upon the draft of the lease which they will submit for approval to the public service commission. Its terms can possess no efficacy until such approval. No liability can arise on the lease until it has been approved. It would be a subversion of the purpose of the statute to permit the establishment of liability for breach of a contract to make a lease when the parties could not make the lease itself binding without the intervention of approval by an independent body, and hence could incur no responsibility on the lease without such approval.

It is not the meaning of the statute to prohibit the assumption of any liability on a lease without approval by a public board and yet to permit freely the assumption of large financial liability for breach of a contract to make a lease. This would allow the accomplishment of a result by indirection which is forbidden by open and straightforward methods. Such a result cannot rationally be presumed to have been within the contemplation of the Legislature.

This ground of defence is decisive and it becomes unnecessary to consider the numerous others put forward in behalf of the defendant.

Exceptions overruled.

ALLETTA E. SLOAN vs. WALDO P. BREEDEN, administrator, & others.

Norfolk. January 14, 1919. — July 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Assignment. Insurance, Life.

Where one having a wife and children has a policy of insurance on his life payable to his legal representatives, the equitable interest in the policy of any of the persons who will be his next of kin and heirs at law in case he dies intestate is assignable during the lifetime of the insured, and if he dies intestate such assignment may be enforced in equity.

BILL IN EQUITY, filed in the Superior Court on January 24, 1917, to enforce the rights of the plaintiff in the proceeds of an insurance policy on the life of William Breeden, late of Brookline, in the hands of Waldo P. Breeden, administrator of the estate of William Breeden, founded upon an assignment alleged to have been made by William Breeden, junior, Grace Breeden Dearborn, Anne B. Fullerton and Grace B. Dearborn, deceased, the widow of the intestate, executed before and after the death of William Breeden.

Certain of the defendants demurred. The judge overruled the demurrers, and, being of opinion that the interlocutory orders made by him overruling the demurrers ought to be determined by the full court before any further proceedings in the Superior Court, reported the case for such determination.

W. P. Murray, for the plaintiff.

H. Guild, for the defendants.

BRALEY, J. The material allegations of the bill are admitted by the defendants. It appears that the policy of life insurance, a part of the proceeds of which are in controversy, was by its terms payable to the legal representatives of the insured represented by the defendant Waldo P. Breeden, the duly appointed administrator of the estate. But, the policy having been assigned by the assured to the bank as collateral security for the payment of his promissory note, which was indorsed and afterwards paid by the plaintiff, who also holds assignments from the heirs at law for the repayment of any premiums and moneys which under the terms of the

assignments she advanced, there was due to her, after the note had been deducted, the amount of the advances with accumulated interest. The administrator having received the remaining proceeds of the policy which comprise the only assets of the estate, filed in the court of probate his first and final account accompanied by a petition for a decree of distribution.

It also is alleged, that the next of kin and heirs at law of the insured agreed to assign to the plaintiff all their beneficial interest of whatever nature in and to the policy, in consideration that she would take up the indebtedness of the intestate at the bank and pay the premiums on the policy as they became due, and in performance of this promise they delivered to her the several assignments shown by the record.

The demurrants contend that no case is stated entitling her to equitable relief and that the remedy at law is plain and adequate. The plaintiff, however, bases her right to maintain the bill not only on the assignment of the assured to the bank to whose title she has succeeded, but also on the partial assignments of the heirs at law.

It is settled that the assignment of the intestate is valid, and that, although executed in the lifetime of their father, the insured, their assignments being sufficient in form are enforceable transfers of the right of the assignors to receive any portion of the proceeds of the policy in the settlement of the estate. *Mutual Life Ins. Co. of New York v. Allen*, 138 Mass. 24, 30. *King v. Cram*, 185 Mass. 103. *Kerr v. Crane*, 212 Mass. 224. *Security Bank of New York v. Callahan*, 220 Mass. 84, 87, and cases there collated. *Boynton v. Hubbard*, 7 Mass. 112, 119, 120. While at common law the assignments are unenforceable and the court of probate regards only the heirs or legatees in a decree for distribution, a court of equity has full jurisdiction to ascertain the rights of their assignees and to decree appropriate relief. *Security Bank of New York v. Callahan*, 220 Mass. 84, 88, 89. *Woodard v. Snow*, ante, 267. *Andrews Electric Inc. v. St. Alphonse Catholic Total Abstinence Society*, ante, 20.

It follows that so much of the interlocutory decree as overruled the demurrers and ordered the "temporary injunction continued in force" is affirmed.

Ordered accordingly.

MICHAEL H. LOONIE vs. FRANK E. WILSON & others.

Suffolk. November 22, 1918. — September 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, PIERCE, & CARROLL, JJ.

Equity Pleading and Practice, Appeal, Order nisi, Costs. *Equity Jurisdiction*, Equitable lien. *Bankruptcy*. Words, "Forthwith."

When in a suit in equity an order is made in the Superior Court that an appeal to this court shall be dismissed for want of prosecution unless it is entered in the clerk's office within ten days, the jurisdiction of the Superior Court is not brought to an end by the expiration of the ten days and, until the Superior Court has dismissed the petition on proof of the fact that the appeal was not entered within the ten days, that court has jurisdiction of the case and although the ten days have expired can extend the time for entering the appeal.

Under St. 1911, c. 284, § 1, which provides that "an appeal from a final decree of the Superior Court shall forthwith be entered in the Supreme Judicial Court," and gives to the Superior Court no power to extend the time of appeal specified in the statute, where such an appeal was taken on July 5 of a certain year and a judge of the Superior Court afterwards found that, in case the printing was completed and the case entered in the Supreme Judicial Court by September 20, it would be entered forthwith, and where the evidence on which this finding was made was not reported, it was held "with some hesitation" that this court could not say that no facts could have existed which would have warranted the Superior Court in coming to the conclusion that in case the appeal was completed by September 20 it would be completed within the time specified in St. 1911, c. 284, § 1.

A contract between a contractor and a city, for the "collection of ashes, the removal of snow and street cleaning" and "for hauling material which went into the construction or repairs of streets," provided that the city might retain out of any money due the contractor such sums as the director of public works should direct as being required "to settle claims for materials or labor furnished for carrying on the contract," of which notice should have been filed as there provided. The contractor became a bankrupt and certain creditors of the contractor, having claims for teams and teamsters furnished to him for the performance of this contract, brought a suit in equity against him and the city for the satisfaction of their claims out of the money retained by the city, alleging that in furnishing their teams they relied on the provision of the contract between the contractor and the city stated above. Held, that the plaintiffs' claims, being for compensation for carts and their drivers, were not claims for "materials or labor furnished" and therefore that the plaintiffs were not entitled to the benefit of any part of the money retained by the city under the contract.

In the case above described it also was held that the plaintiffs were not entitled to share in the fund retained by the city in case they could prove the separate value

of the labor of the drivers furnished by them, because there was no debt of the contractor to pay such sums separately.

Where a bankrupt is a nominal party to a suit in equity in which he is represented by his trustee in bankruptcy and prevails in the suit, the costs to which he would be entitled if a real party in interest should be awarded to his trustee in bankruptcy.

BILL IN EQUITY, amended from an action at law on February 1, 1917, by Michael H. Loonie against Frank E. Wilson and his trustee in bankruptcy, the National Surety Company, a corporation organized under the laws of New York and the city of Boston, to recover the sum of \$1,413 due to the plaintiff by the defendant Wilson for teams and drivers furnished to the defendant Wilson for the performance of a contract between him and the city of Boston dated January 25, 1916.

Four claimants filed petitions to intervene and were made additional plaintiffs.

The case was referred to a master, who filed a report containing the findings stated in the opinion. Article 7 of the contract mentioned above was as follows: "The City may retain out of any money due the Contractor such sum as the Commissioner shall direct as being required to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed in the office of the City Clerk of the City, and with the Commissioner, and claims against the City, its agents or employees, relating to the contract." The master found "as a fact, in accordance with the agreement of all counsel, that the plaintiff and the other claimants knew of the provisions of the contract and bond and relied upon them in furnishing the men and teams." The counsel for the trustee in bankruptcy and for the surety company objected to this finding as immaterial.

The case was heard by *Wait, J.*, who made the following memorandum of decision:

"The bill cannot be maintained against the surety company. This follows from *Hunter v. Boston*, 218 Mass. 535.

"It cannot be maintained upon the St. 1909, c. 514, § 23, for the statute does not apply to such a contract as is here before the court.

"It can only be maintained if the language of the contract and the action of the city has created an equitable lien.

"Clause 7 of the contract is largely without meaning, if it is to be construed as inserted to meet the requirements of the act of 1909. That act does not apply.

"There is no rule of law or precept of public policy which forbids the city to put itself in a position where it can make certain that those who furnish service to it pay the bills they justly incur in the course of so doing. The city need not do it. Under this contract it is possible to say — and courts in similar cases have said — that it is not bound to retain money from the contractor with which to pay for labor and materials and services connected with the work for which the contractor has failed to pay. But if it does retain money beyond what was necessary for its own protection under the provision of the contract, it may well be compelled to give to those who have relied upon the provision and acted under it, the benefit of its action.

"In this case Boston did so retain money; the petitioners did rely on the provision of the contract; they did act under it in giving notice of their claims.

"I rule that the evidence admitted by the master against the city and the assignee was material, and its admission was proper for the purpose of showing the circumstances surrounding the parties interested in the contract and interpreting their action.

"The proof by the various petitioners in the bankruptcy of Wilson does not preclude them from this proceeding, though anything received in the bankruptcy lessens the possible recovery here, as a credit in favor of Wilson.

"Let decrees be prepared confirming the master's report, dismissing the bill as against the National Surety Company with costs taxed as at law for that company; and ordering payment by the city of Boston of the amount retained by it to the petitioners in the amounts found due by the master, less any dividends received by them from the bankrupt estate of Wilson with costs taxed as at law against the city and the assignee."

Later, on June 29, 1918, by order of the judge a final decree was entered in accordance with this memorandum of decision.

On July 5, 1918, Guy A. Ham, trustee in bankruptcy of Wilson, appealed from this decree. The subsequent proceedings are described in the opinion. The plaintiff Loonie appealed from the order of August 28, whereby the motion of the defendant

Guy A. Ham, trustee in bankruptcy, was allowed, extending the time for the completion of his appeal to September 20, 1918.

R. H. Willard & W. H. Taylor, for the trustee in bankruptcy, submitted a brief.

J. J. Gaffney, for the plaintiff Loonie.

J. A. Vitelli, for the intervening petitioner Henry D. Kelley.

H. W. Babb, for the intervening petitioner Edward Hoar.

LORING, J. The plaintiff had a decree in the Superior Court. From that decree the defendant Ham, trustee in bankruptcy of the defendant Wilson, took an appeal. On August 8, 1918, the plaintiff Loonie made a motion in the Superior Court that this appeal should be dismissed for want of prosecution. On August 16 this motion was allowed "unless papers on appeal are prepared and entered in clerk's office of full court within ten days." On the day after the ten days expired Ham made a motion in which he alleged that he was "informed that it is not possible to prepare the papers within ten days; that your respondent intends in good faith to prosecute his appeal. Wherefore your respondent moves the court to extend the time . . . to and including October 1, 1918." On August 28, 1918, this "motion [was]" allowed by the court as of 26th, time extended to Sept. 20, 1918."

The plaintiff Loonie has made a motion in this court that Ham's appeal be dismissed on the ground that on August 28 (when the order extending the time was made) the jurisdiction of the Superior Court over the cause had come to an end. That contention is disposed of by the decision of this court in *Plaisted v. Cooke*, 181 Mass. 118. In that case it was decided that an order allowing a motion to dismiss a cause unless something is done within a specified time is in legal contemplation an order that the cause will be dismissed if the action in question is not taken within the time specified and that until proof has been made of the fact that the action in question was not taken within the time specified and an order based upon proof of that fact dismissing the action has been entered the jurisdiction of the court has not come to an end. Loonie relies on *Hack v. Nason*, 190 Mass. 346. That decision has no bearing on this question. The conclusion reached in *Hack v. Nason* was reached because R. L. c. 173, § 106, provides that on the expiration of twenty days the court has no juris-

diction to allow a bill of exceptions unless the time is extended within twenty days.

The order made on August 28 should not have been made "as of August 26." When an order is made as of an earlier day it is made in that form to avoid an intervening act on the theory that there was an error in the earlier order. There was no occasion for such an order in the case at bar. On August 28 the cause was still pending and for that reason the court on that day could modify the earlier order on being satisfied that that ought to be done, although Loonie was entitled to an order dismissing the cause unless the earlier order was modified. Loonie's motion to dismiss the appeal taken by the defendant Ham must be denied.

In addition to his motion to dismiss made in this court Loonie took an appeal from the order of August 28. That raises the question whether that order was correct. By St. 1911, c. 284, § 1, it is provided that "an appeal from a final decree of the Superior Court shall forthwith be entered in the Supreme Judicial Court." No power is given to the Superior Court to extend the time specified in the statute. The question presented by the appeal therefore is whether under this statute which limits the appellant to entering his appeal in the Supreme Judicial Court "forthwith," the order allowing the appellant to complete his appeal on or before September 20, 1918, was erroneous. Upon taking his appeal it was the duty of the appellant to "forthwith" give an order to the clerk of the Superior Court to make up and print the record, and on the printing being completed to "forthwith" enter the case in the Supreme Judicial Court. *Griffin v. Griffin*, 222 Mass. 218.

It seems to be strange, if an order to print the record here in question was given by the appellant "forthwith" on the order being made on July 5, that the Superior Court should have found that in case the printing was completed and the case entered in the Supreme Judicial Court by September 20 it would be entered "forthwith." The evidence on which this order was made is not before us. With some hesitation we have come to the conclusion that we cannot say that no facts could have existed which would have warranted the Superior Court in coming to the conclusion that in case the appeal was completed September 20 it would be completed within the time specified in St. 1911, c. 284, § 1. The

burden of showing error was on Loonie. In the absence of the evidence on which the Superior Court acted that burden has not been sustained. The order of August 28 is not shown to be erroneous and must be affirmed.

The suit in the case at bar is brought by five creditors of the defendant Wilson to recover payment of moneys severally due to them from Wilson (1) out of a fund of \$4,220.23 retained by the city of Boston pursuant to article 7 of its contract with Wilson, and (2) to recover these sums from the National Security Company by reason of a bond given by it to the city of Boston conditioned for the faithful performance by Wilson of the work which he had contracted to do for the city and also for the payment "for all labor performed or furnished and for all materials used in carrying out said contract." Wilson's contract with the city was a contract for the "collection of ashes, the removal of snow and street cleaning" and "for hauling material which went into the construction or repair of streets." The claims of the five plaintiffs against Wilson were for teams and teaming hired of them by him in performing that contract.

As originally drawn the bill was brought on the notion that the city had procured the bond to be given by the surety company in compliance with St. 1909, c. 514, § 23. But that statute applies only in cases where "public buildings or other public works are about to be built or repaired [by a county, city or town] . . . upon which liens might attach for labor or materials if they belonged to private persons." It was specifically so provided in the original act (St. 1878, c. 209) which applied to contracts of that kind entered into in behalf of the Commonwealth. That provision was preserved when that act was re-enacted in Pub. Sts. c. 16, § 64. But when that act was re-enacted in the Revised Laws (R. L. c. 6, § 77) the form of the enactment was changed. Although the provision quoted above was not in terms re-enacted in R. L. c. 6, § 77, that act (by the true construction of it) is an act limited in the same way that it would have been limited in terms had this clause been re-enacted. When the provisions of R. L. c. 6, § 77 were extended to counties, cities and towns by St. 1904, c. 349, the form of enactment adopted in R. L. c. 6, § 77 was followed and that form of enactment again was followed in St. 1909, c. 514, § 23. For a history of these acts see *Friedman v.*

County of Hampden, 204 Mass. 494. As we have said the bill in equity now before us was originally brought on the theory that the bond given by the defendant surety company was given in compliance with St. 1909, c. 514, § 23. But it is plain (for the reasons stated above) that that act does not apply in case of the contract between the city of Boston and Wilson here in question.

After the bill was brought this view of the law seems to have been recognized by the plaintiffs and the bill was amended by setting up article 7 of the contract between the city of Boston and Wilson and the fact that under it \$4,220.23 had been retained and is now in the hands of the defendant city. Article 7 of the contract between Wilson and the city of Boston provided that the city might retain out of any money due to Wilson such sum as the commissioner of public works should "direct as being required to settle claims for materials or labor furnished for carrying on the contract, notice of which claims . . . shall have been filed in the office of the City Clerk of the City, and with the Commissioner, and claims against the City." So far as the bill proceeds on the ground that article 7 was inserted in the contract between Wilson and the defendant city in compliance with St. 1909, c. 514, § 23, the plaintiffs are met with the same objection that is fatal to the bill brought by them to secure payment from the surety company. That objection is that the work provided for in the contract between Wilson and the city is not work on public buildings or other public works "upon which liens might attach for labor or materials if they belonged to private persons." And that has been recognized by the plaintiffs in their arguments in this court.

Failing to maintain the bill on the ground that the bond of the surety company and the retention of funds by the city under article 7 were given and made in compliance with St. 1909, c. 514, § 23, the plaintiffs have undertaken to maintain their bill on the ground that they knew of the provisions of article 7 and relied upon them and that for this reason the \$4,220.23 retained by the city under article 7 of its contract with Wilson is impressed with an implied common law equitable lien for the payment of their debts. The decree of the Superior Court in favor of the plaintiffs was based upon this proposition.

The decision of the Superior Court went on the ground that

the city was not "bound to retain money . . . with which to pay for labor and materials and services connected with the work for which the contractor has failed to pay. But if it does retain money beyond what was necessary for its own protection under the provision of the contract, it may well be compelled to give to those who have relied upon the provision and acted under it, the benefit of its action."

The Superior Court was wrong in stating that article 7 provided not only for the retention of money "to settle claims for materials or labor furnished in carrying on the contract" but also for "services connected with the work." The latter clause is not in article 7. That article is limited to the first clause.

The claims of the plaintiffs are not claims for "materials or labor furnished." Their claims are claims for single and double teams with or without extra men and for rent of carts without either horses or men, and in each instance there is a charge for a single sum for "Hire of one single team" or "1 Double Team" or "1 team & 2 helpers" or similar charges. These are not contracts "for materials or labor furnished." See, in this connection, *Libbey v. Tilden*, 192 Mass. 175; *Thomas v. Commonwealth*, 215 Mass. 369. No equitable lien can be held to have arisen for the whole sums due the plaintiffs.

A further question arises, namely: In case the plaintiffs can prove what portions of the single sums due for labor and the use of the teams represent the value of the labor and what portions of them represent the value of the use of the teams, are they entitled to an equitable lien for those portions of the single sums due them which represent the value of the labor. We are of opinion that they are not. No debt is due from Wilson to these plaintiffs for those portions of the single sums (due the plaintiffs for labor and the use of teams) which represent the value of the labor. Since there is no debt for these portions of the single sums due the plaintiffs there can be no implied equitable lien as security for the payment of them. The doctrine of dividing a debt into separate parts not agreed to by the parties for the purpose of imposing a lien on a fund for the payment of a part of that debt is a creature of statute. In case of mechanics' liens such a division is made. But when such a case under the mechanic's lien statute was first presented it was held that no division could be made.

Graves v. Bemis, 8 Allen, 573. Thereupon St. 1872, c. 318, was enacted authorizing a division of such a debt in such case. It was provided in this act that there should be a mechanic's lien for the part of such a debt for which there would have been a lien had that been the whole of the indebtedness. And that statute has been re-enacted since then. Pub. Sts. c. 191, § 2. R. L. c. 197, § 2. The principle that in the absence of a statute no division of the debt can be made by the law was applied in the recent case of *Libbey v. Tilden*, 192 Mass. 175. The debt in that case not being within the statute, it was held that no lien could be imposed for a part of the debt, although if there had been a debt for that part there would have been a lien. In the absence of a statute authorizing it, the court has no right to divide a single debt created by the parties whether it be for the purpose of imposing an implied equitable lien on a fund for the payment of it or for any other purpose. For such a proceeding there is neither precedent nor principle.

It follows that the decree of the Superior Court dismissing the bill as against the surety company must be affirmed with costs. So far as relief was given against the defendant city the decree must be reversed and a decree must be entered dismissing the bill as against the defendants Wilson, Ham and the city of Boston. Wilson is a nominal party and so not entitled to costs. Ham and the defendant city are entitled to the payment of one set of costs each.

Decree accordingly.

BOSTON AND NORTHERN STREET RAILWAY COMPANY vs. ABNER
C. GOODELL & others.

Suffolk. January 9, 1919. — September 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE,
& CARROLL, JJ.

Trust, Resulting. Limitations, Statute of. Laches. Evidence, Admissions, Of possession of land. Corporation, Ultra vires.

In a suit in equity by a street railway corporation, against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a

parcel of pasture land situated in two towns, which was purchased in the name of the defendant twenty-seven years before the filing of the bill and was paid for by the defendant's check for less than \$1,200, there was evidence that the money with which the property was purchased belonged to the predecessor of the plaintiff's predecessor in title and was not furnished by the defendant, that the property always was treated as belonging to the predecessor of the plaintiff and was entered thus on its books with the defendant's knowledge, that it was conveyed with other property to trustees to secure certain bonds of that company, which afterwards were paid, that with the knowledge and consent of the defendant the property was taxed in both towns in which it lay to the plaintiff's predecessor in title, which paid the taxes, that afterwards such taxes were paid by the plaintiff and that the defendant paid no taxes on the land at any time down to the filing of the bill, that the defendant made under oath annually for ten years returns to the railroad commissioners, which included an item stating that the land in question was owned by the plaintiff's predecessor in title and not by the defendant. There also was evidence that the defendant recognized the rights of the plaintiff as the equitable owner of the land and never asserted an adverse title nor attempted to repudiate the trust before the bringing of the bill. There was nothing to show that the defendant ever had possession or occupation of the land. *Held*, that a resulting trust was established and that the defendant, or (the defendant having died) his heirs at law, must be ordered to convey the land to the plaintiff.

In the case above described it also was *held* that, the defendant never having denied the plaintiff's title before the bringing of the bill, the statute of limitations could not have begun to run in his favor.

In the same case it was *held* that on the findings of the master the plaintiff's claim was not barred by laches.

In the same case it was *held* that the entries upon the books of the plaintiff and the returns made to the railroad commissioners were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners.

In the same case it was *held* that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff or those under whom it claimed.

In the same case it appeared that the returns filed and sworn to by the defendant contained a statement that the land was "owned by the company, needed in operating road," and it was *held* that this was evidence warranting a finding by the master that the land was owned lawfully by the company and was not held *ultra vires*.

BILL IN EQUITY, brought originally in 1901 and filed as amended on March 30, 1916, by the Boston and Northern Street Railway Company, as the grantee of the Naumkeag Street Railway Company, alleged to be the beneficiary of a resulting trust in a parcel of pasture land in the towns of Hamilton and Topsfield which stood in the name of the defendant Abner C. Goodell, and, after

his death since the filing of the bill, in the names of his heirs at law, praying that the defendant Abner C. Goodell, and now his heirs at law, might be ordered to convey and release all his right, title and interest in such parcel of land and that the defendants Benjamin W. Russell and Zina Goodell might be ordered to convey and release to the plaintiff any title vested in them as trustees under a certain indenture of March 5, 1875, made to secure certain bonds which had been paid.

The case was referred to a master, who made a report containing the findings that are stated in the opinion.

The case was heard by *Jenney, J.* He made an interlocutory decree overruling the exceptions both of the plaintiff and of the defendants to the master's report and confirming the report, and made an order for a final decree ordering the defendants to convey the real estate in question in fee simple to the plaintiff and to pay the plaintiff's costs amounting to \$55.33. Thereupon the judge reported the case upon the pleadings, the master's report and the exceptions thereto, the interlocutory decree and the order for the final decree for determination by this court.

The case was argued at the bar in January, 1919, before *Rugg, C. J., Braley, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices.

B. B. Jones, (I. McD. Garfield with him,) for the plaintiff.

F. Hutchinson & P. B. Smith, for the defendants.

CROSBY, J. This is a bill in equity brought originally against Abner C. Goodell, Benjamin W. Russell and Zina Goodell. On July 19, 1914, Abner C. Goodell died, and afterwards his widow, Martha P. Goodell, his heirs at law, George H. Goodell and Alfred P. Goodell, and the administrators of his estate were joined as parties defendant. The bill alleges that the plaintiff is the equitable owner of a certain parcel of land situated in the towns of Hamilton and Topsfield in the county of Essex, the record title to which stands in the name of the deceased (hereinafter referred to as Goodell); that it was held by him in trust for the plaintiff, and that the plaintiff is entitled to a conveyance thereof from the widow and heirs at law. The case was referred to a master. Both the plaintiff's and the defendants' exceptions to the master's report were overruled, the report was confirmed, and a final decree was ordered directing the widow and heirs at law to

execute, acknowledge and deliver to the plaintiff, a deed of the real estate described in the bill. The case is before us upon a report of the judge of the Superior Court who ordered the decree to be entered.

The master finds certain facts, hereinafter recited, which we deem material to the decision of the issues presented. It is to be observed, however, that while the report recites certain evidence it does not contain all the evidence; nor is the evidence reported. The master made the following and other findings:

The Salem Street Railway Company was incorporated in 1861 and was operated by that company until 1871, when it leased its road, franchises and property to one Robinson for twenty years at a rental of \$100 a year, the lessee agreeing to pay the debts of the lessor. At that time the company was heavily in debt. Goodell, who was a lawyer, was president and a director of the company, Robinson also was a director, and one Mack was treasurer and a director. The railway was operated under the lease until March 8, 1875. In 1873 the land in question was conveyed to Robinson by three deeds which were duly recorded in 1874. The money to pay for the property was supplied by Goodell's check for \$1,164.34, dated February 18, 1874. At the time the above described deeds were recorded there also was recorded a deed dated January 1, 1874, from Robinson to Goodell of the same land. It is not disputed that the effect of these four conveyances was to vest the legal title in Goodell. On February 26, 1875, the Naumkeag Street Railway Company was incorporated under St. 1874, c. 260. St. 1885, c. 366. Goodell, Mack and Robinson (with fifteen others) were the incorporators, and all three were elected directors. Goodell, Mack and one Wheatland, the treasurer, constituted the executive committee of the directors. This corporation was organized to acquire an assignment of the Robinson lease and to assume the lessee's debts and liabilities thereunder, and the lease was duly assigned to the company. At about the same time the company voted to issue bonds to meet its liabilities and on March 9, 1875, Goodell executed a deed of the premises in question to five trustees, as security for the payment of the bonds. The deed was ratified by vote of the directors passed on the same date. Except for this deed, the record title to the land remained in Goodell during the entire time he was an

officer of the railway company, that is, from January 1, 1874, to June 13, 1884, when he resigned. With the exception of a reconveyance from two of the trustees to him in 1895, the record title was not affected up to the time of the bringing of this suit. The railway continued to be owned and operated by the Naumkeag Street Railway Company until March 7, 1893, when it was conveyed by deed of that date to its successor, the Lynn and Boston Railroad Company. St. 1881, c. 152. Whether this deed conveyed the land described in the bill is disputed by the defendants. The description in the deed so far as it relates to the land in question is as follows: "together with any and all real estate wherever the same may be situate belonging to said Naumkeag Street Railway Company; also the land conveyed to said grantor by deed of James P. Robinson and Abner C. Goodell, Jr., dated June 1, 1874 and recorded in said registry Book 898, Leaf 112." It is admitted that the name of the Lynn and Boston Railroad Company has been changed to that of the present plaintiff.

Before the year 1895 the bonds secured by the conveyance from Goodell to the trustees had been paid, and two of the surviving trustees reconveyed the land to Goodell by deed dated May 13, 1895; on May 15, 1911 (some of the trustees having previously deceased), Benjamin W. Russell executed a deed of the land to Goodell, which deed contains a recital that the grantor is the sole survivor of the trustees who had not already conveyed his interest.

The foregoing is a recital of the facts found by the master respecting the title to the land which the plaintiff seeks to recover. He also found the following facts bearing upon the contentions of the parties: that there was no direct testimony from any person named in any of the conveyances as to the facts and the circumstances surrounding them, but the plaintiff offered certain evidence of acts and conduct of Goodell, and records and books the various companies kept while he was an officer; that he was, and for many years had been, the president and managing director of the Salem Street Railway Company; that during the period when the property was operated by Robinson, the lessee, Goodell and Mack had more to do with operating the road than Robinson; that Goodell was very active in raising money and supervising the operation of the road; that on the organization of the Naum-



keag Street Railway Company he took a prominent part; that the records of the corporation showed that he voted on all the resolutions authorizing the various conveyances made on or about March 8, 1875; that he acquiesced in and assented to all the arrangements made at that time; that from 1875 to June 30, 1884, he owned a large interest in, and was a director and most of the time president of, the Naumkeag Street Railway Company; that he had access to its books, examined them frequently, if not daily, and to some extent supervised the bookkeeping; that under these circumstances certain entries were made; that there were entries in the books of taxes paid by the company to the towns of Hamilton and Topsfield for the years 1876 to 1879, both inclusive, and for 1881; that during all this period there was no evidence to show that the company owned any land in Hamilton or Topsfield aside from the land in question; that there appeared in the ledger under the heading "'Land Account No. 41,' 1875, Mar. 8. To O. Surplus, \$1200. with a cross reference to page 3 of the day book. The entry on page 3 of the day book is, — Land Account No. 41, Pasture Land in Topsfield and Hamilton, \$1200.;" that the words "O. Surplus" mean original surplus. The master found that these entries in the books kept under Goodell's frequent inspection, and to some extent under his direction, showed that on March 8, 1875, he knew the company claimed the land as its property and so carried it on its books; that no books of account or records kept before the organization of the Naumkeag Street Railway Company in 1875, and no books or records of the Salem Street Railway Company or Robinson, lessee, were introduced in evidence.

On the day book of the company the following entries appear: "'Naumkeag St. Ry. Co. Sept. 30, 1880. Wm. Mack, Tr. Dr. To A. C. Goodell, Jr. \$1200. For land in Topsfield and Hamilton (pasture) conveyed by A. C. G. Jr. to trustees to secure bonds N. S. R. Co. 1875 for a nominal consideration, he having been charged with the original purchase money in his account before the N. S. R. Co. was incorporated, \$1200.'" It is found that this entry, which was made with Goodell's knowledge, has a cross reference to page 477 of the day book and refers to ledger pages 198 and 207. On page 198 under the heading "Wm. Mack Trust" is entered "Sept. 30, 1880, Wm. Mack Trust To A. C.

G. Jr. \$1200." On page 207 appears the ledger account of A. C. Goodell, Jr., and on the credit side under date of Sept. 30, 1880, is entered "By W. M. Trust \$1200." Goodell resigned as president of the company on June 13, 1884, and although there is no evidence that he had anything to do with the books of the company after that date, it appears that the land continued thereafter to be carried on the books of the company as an asset.

We are of opinion that the foregoing entries establish two facts: (1) that the money with which the property was paid for by Goodell's check was not money that originally belonged to him, and (2) that the money with which the property was in fact purchased was money of the Salem Street Railway Company, the predecessor in title of the Naumkeag Street Railway to whose rights and property this plaintiff is the successor in title. The entry on the ledger under date of March 8, 1875, shows that "Land Account No 41" was charged with the original surplus \$1,200, and the only fair inference is that the land so bought was paid for out of a fund referred to as original surplus and which was the property of the Salem Street Railway Company. This entry establishes the fact that Goodell's check did not represent his money. The entry on the blotter, dated September 30, 1880, — more than five years after the land was acquired, — and which was transferred to the day book of the same date, charges the street railway company, "Wm. Mack, Tr. Dr. To A. C. Goodell, Jr. \$1200." The explanation given on the blotter is that the charge was "For land in Topsfield and Hamilton (pasture) conveyed by A. C. G. Jr. to trustees to secure bonds N. S. R. Co. 1875 for a nominal consideration, he having been charged with the original purchase money in his account before the N. S. R. Co. was incorporated, \$1200." This entry shows that Goodell had been charged with the original purchase money before February 26, 1875, — when the Naumkeag Street Railway was incorporated. This charge so made at about the time the land was purchased represented the \$1,200 paid to Goodell from the original surplus of the Salem Street Railway Company to pay for the property. The entry and the explanation accompanying it show conclusively that the purchase price was not furnished by Goodell, but was money paid to him from the original surplus of the company. The master finds that this entry was made with Goodell's knowl-

edge and has a cross reference to ledger pages 198 and 207 where the accounts of the "Wm. Mack Trust" and "A. C. Goodell, Jr." respectively appear. In the former the charge is "A. C. G. Jr. \$1200." and in the latter the credit is "By W. M. Trust \$1200." These ledger entries, posted from the day book of the same day, charge the Wm. Mack Trust with the purchase price as the land had been conveyed by Goodell to the trustees to secure the bonds, and at the same time Goodell is credited with the amount with which he had been originally charged for the purchase money paid him, and this credit of \$1,200 was in the end equivalent to a cash payment of that amount to him on that day. The apparent purpose of this credit of \$1,200 in Goodell's account was to relieve him from the charge for that amount made about the time the land was bought and afterwards conveyed by him to the trustees.

The master states that there is no further entry in Goodell's account with the company relative to this land until 1884; that on June 1 of that year Goodell's account on the company's ledger showed a balance due the company of \$2,083.89; that at a meeting of the directors held on June 9, 1884, at which all the directors, including Goodell, were present, it was voted that he be allowed for past and future use by the company of patent fare boxes (which were his own invention) the balance which he owed the company; that on June 13, 1884, he resigned as president, and on June 30, 1884, the company's ledger account with Goodell was balanced by an entry of \$2,083.89.

It also appears that with the knowledge and consent of Goodell the property was assessed in both Hamilton and Topsfield for the years 1876 to 1884, both inclusive, to the Naumkeag Street Railway Company and that that company paid the taxes on the property during those years; that there were other entries on the books made with the knowledge and consent of Goodell showing that the land was included in and as part of the assets of the company.

During the years 1875 to 1884, both inclusive, returns were made annually by the company to the railroad commissioners of the Commonwealth, in each of which appears as a part of its assets the item "land owned by the company, needed in operating road." The amount opposite the item is \$1,200 for the years 1875 to 1881, both inclusive; in the years 1882 and 1883 it was

increased to \$2,390.07, and in 1884 to \$3,590.07. These returns were made up from the trial balance under the direction of Goodell who signed and made oath to them during each of these years. St. 1876, c. 185, §§ 2, 3. St. 1874, c. 372, § 15. St. 1876, c. 173. The land referred to in these returns is found by the master to be the land in question.

Since the year 1884 the property has been assessed to the various street railway companies operating the road; and the master finds that these companies from 1884 down to the beginning of this suit have paid annually the taxes on the land, and that Goodell has paid no taxes upon the land at any time down to the time of the filing of the bill.

The statement of the master that there was no evidence that the company owned any real estate in Hamilton or in Topsfield other than the property in controversy, well warranted a finding that the land referred to upon the books of the corporation, and in the returns to the railroad commissioners as "owned by the company, needed in operating road" was the land described in the bill.

1. The contention of the defendants that the deed dated March 7, 1893, from the Naumkeag Street Railway Company to the Lynn and Boston Railroad Company does not include the land in question, cannot be sustained; while this deed describes the land as "conveyed to said grantor by deed of James P. Robinson and Abner C. Goodell, Jr., dated June 1, 1874 and recorded in said registry Book 898, Leaf 112," it is plain that the recital is an error and was intended to refer to the deed of January 1, 1874, from Robinson to Goodell, Jr.; this is apparent from an examination of the deed recorded in Book 898, Leaf 112, which describes the land from Robinson to Goodell, Jr., of that date.

2. As president of the Naumkeag Street Railway Company Goodell made under oath annually for ten years the returns to the railroad commissioners which included an item that is found to refer to the land in question as land owned by the company needed in operating the road; he either caused or knowingly permitted entries to be made upon the books representing that the land belonged to the company and not to him. So far as appears, with one exception, there was no evidence that he ever claimed any title to the land until the bringing of the bill. There was

testimony that some time previous to 1901 he had "explained to a member of his household that he so listed this land unwillingly and because assured by the clerk of the railroad commissioners that it would help other railroads and not injure his title." The master was not bound to believe this testimony. In any event, it cannot affect his finding that "this evidence did not seem to me to control or offset the findings herein made;" his conclusion is that "the evidence satisfied me that the books, deeds and votes had been sufficiently brought to Mr. Goodell's attention to bind him, that the land referred to in most of the documents and in the books was sufficiently identified as the land in question, and that all of the evidence was admissible as tending to establish either a resulting trust or a constructive trust."

We are of opinion that Goodell would not have been entitled in his lifetime, nor can his heirs at law since his decease be permitted, to hold the land which has greatly increased in value. His acts and conduct, the entries on the books, the returns to the railroad commissioners made and sworn to by him, the payment of taxes by the plaintiff and its predecessors in title with his knowledge and consent and the other evidence, warranted the finding that the land "was treated and regarded both by the street railway companies with whom Goodell dealt while an officer and director and by Goodell himself as their property and not his."

The evidence warranted the further finding that he recognized the rights of the equitable owner and never asserted nor claimed to hold adversely or attempted to repudiate the trust before the bringing of the bill. There is nothing to show that he was ever in the occupation or possession of the land. Under all the circumstances as disclosed by the evidence, most of which is documentary and not in dispute, although no actual fraud on the part of Goodell appears, still it would be contrary to equity and good conscience for him to have retained the land. It must be held that a resulting trust was established in favor of the plaintiff and that since Goodell's decease the land is charged with the same trust. *Amory v. Amherst College*, 229 Mass. 374. *H. C. Girard Co. v. Lamoureux*, 227 Mass. 277. *Howe v. Howe*, 199 Mass. 598. *Lufkin v. Jakeman*, 188 Mass. 528. *St. Paul's Church v. Attorney General*, 164 Mass. 188. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway*, 151 U. S. 1. *Soar v. Ashwell*,

[1893] 2 Q. B. 390. *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196. Perry on Trusts, (6th ed.) § 865, and note. 1 Pom. Eq. Jur. § 155.

The failure of the master to find that the consideration for the original purchase was money of the Salem Street Railway Company does not prevent this court from drawing the inference which should be drawn by us from the facts as found. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138, 142, 143. *Old Corner Book Store v. Upham*, 194 Mass. 101. *Mansfield v. Wiles*, 221 Mass. 75, 84. The reason which actuated the parties in causing the title to the land, which had been purchased with funds of the Salem Street Railway, to be conveyed to Goodell does not appear, nor is it material in view of the entries on the books and the findings of the master and the reasonable inferences to be drawn therefrom.

3. There is no evidence to show that Goodell denied the plaintiff's title or repudiated its claim to the land before the bringing of the bill. Under such circumstances the statute of limitations would not run in his favor. *Jones v. McDermott*, 114 Mass. 400. *Potter v. Kimball*, 186 Mass. 120. *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 259. *Amory v. Amherst College*, *supra*.

4. We cannot adopt the defendants' contention that the right to maintain the bill is barred by laches. So far as laches is a question of fact, the master has found that the plaintiff's claim is not barred on that ground; we cannot say that this finding in the absence of a report of the evidence was wrong; nor could it be ruled as matter of law that the remedy which the plaintiff seeks to enforce is barred for that reason.

5. The evidence offered by the plaintiff of the entries upon the books and the returns made to the railroad commissioners was admissible upon the issues whether Goodell claimed to own any beneficial interest in the property and whether he admitted and recognized the plaintiff and its predecessors as the equitable owners. The evidence of the payment of taxes by the plaintiff and its predecessors was admissible upon the issues whether Goodell was or was not in possession of the land as owner and whether he ever claimed to hold adversely to the plaintiff or those under whom it claimed. *Enfield v. Woods*, 212 Mass. 547.

6. All the defendants' exceptions to the rulings and findings of the master have been examined and considered. It is unnecessary to refer to them in detail, but is sufficient to say that we discover no harmful error; therefore they must be overruled.

7. The contention of the defendants that neither the plaintiff nor its predecessors had any authority to acquire, hold or convey the land, and that any attempt to do so was *ultra vires*, cannot prevail. The recital in the returns filed by Goodell with the railroad commissioners that the land was "owned by the company, needed in operating road" is evidence as against the defendants that it was land lawfully owned by the company, which it could convey to the plaintiff. The master's inability to find on what the statement in the returns that the land was needed in operating the road was based, does not affect his finding that there was evidence (which is not reported) that the Naumkeag Street Railway had authority to hold and convey the land, and which undoubtedly convinced him that the street railway companies did not act in this connection beyond the scope of their respective charters.

As the evidence warranted a finding that there was a resulting trust, we need not consider whether the returns made to the railroad commissioners would warrant a finding that there was an express trust. R. L. c. 147, § 1. A majority of the court are of opinion that the decree must be affirmed with costs.

So ordered.

LOUIS ROSS vs. ALBERT C. BURRAGE.

Suffolk. January 16, 17, 1919. — September 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Contract, Construction. Agency, Existence of relation. Equity Jurisdiction, False representation. Words, "Takes over," "Properties," "As profit."

A letter addressed by a promoter of mining companies to a mining engineer contained the following agreement: "It is understood and agreed by and between us that from the day you last left Boston you are to receive a salary of five hundred dollars a month and when away from Boston your actual travelling expenses, this arrangement to terminate any time upon thirty days notice from either

party. . . . It is further understood that you are to receive in the common shares of each company which takes over, through me, properties in Chile and Peru, other than Ferrobamba, brought to me by or through you, five per cent of such common shares as may come to me as profit by virtue of such taking over." *Held*, that no partnership or fiduciary relation was created by this agreement and that the relation of the writer of the letter to the person addressed was merely that of employer to employee, the five per cent of common shares mentioned being compensation for services in addition to the salary of \$500 a month and his travelling expenses when away from Boston.

In interpreting the same contract it was *held*, that the employee was to receive in the common shares of companies which actually had acquired through the writer properties in Chile and Peru brought to him by or through the employee five per cent of such common shares as had come to the writer as profit by virtue of such taking over, and that such percentage was not earned by the acquisition by such companies of an option to purchase not yet exercised.

In a suit in equity brought upon a subsequent contract between the same parties, which cancelled the agreement quoted above, it was *held* to be unnecessary to consider whether a certain provision of the subsequent contract was a misrepresentation of fact or whether, if a misrepresentation, it was a material one, because there was no finding by the master that the plaintiff relied upon the alleged misrepresentation.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 28, 1913, by a mining engineer against a promoter of mining companies to compel the defendant to assign to the plaintiff certain mining shares as described in the opinion.

On June 27, 1913, the case was referred to a master "to hear the parties and their evidence, to find the facts and report the same to the court." The master's report and supplemental report were filed on June 13 and September 23, 1918. The findings of the master material to the decision are stated in the opinion.

The case came on to be heard before *Crosby, J.*, and was reserved by him upon the pleadings, the master's report and supplemental report, and the defendant's exceptions thereto for determination by the full court.

S. L. Whipple & A. Lincoln, for the plaintiff.

B. B. Jones, for the defendant.

LORING, J. This is a bill in equity brought by the plaintiff to compel the defendant to assign to him two hundred and fifty shares in the capital stock of the Chile Exploration Company, being five per cent of the common shares in the capital stock of that company received by the defendant for certain atacamite lands at Chuquicamata, Chile, in accordance with the provisions of the concluding paragraph of the following letter: "London,

England, Sept. 14, 1910. Louis Ross, Esq., Dear Mr. Ross:— It is understood and agreed by and between us that from the day you last left Boston you are to receive a salary of five hundred dollars a month and when away from Boston your actual traveling expenses, this arrangement to terminate any time upon thirty days notice from either party. . . .

“It is further understood that you are to receive in the common shares of each company which takes over, through me, properties in Chile and Peru, other than Ferrobatmba, brought to me by or through you, five per cent of such common shares as may come to me as profit by virtue of such taking over. Yours very truly, Albert C. Burrage.”

In two different places in his report the master has found that the Chuquicamata property here in question was brought to the defendant's attention by others through the plaintiff. Both findings have been attacked by the defendant. It seems to us that if these findings are open to attack a finding to the same effect would have to be made upon the subsidiary findings of fact made in the report. But in the view which we have taken of the case it is not necessary to come to a final decision upon that point. For we are of opinion, that if the two findings made by the master are to stand or if a similar finding is made by us, the plaintiff is not entitled to the shares he is seeking to recover in this suit.

The material circumstances which have given rise to the suit now before us so far as the legal aspects of the case go are as follows: The defendant is by profession a lawyer. After thirteen years' practice he retired from the bar in 1897 and devoted himself to mining. Ten years later he conceived the idea that improvements could be made in the leaching process then in use by which copper is extracted from the ore. He hoped by these improvements to reduce the cost of extracting copper from ore to such an extent that low grade copper properties which up to that time had not been worked at a profit would become of value. For this purpose he engaged the services of a chemist Bradley by name. Being convinced of the ultimate success of the process being developed by Bradley, he determined, in 1909, to acquire large low grade copper properties which had been abandoned as unprofitable. In the winter of 1909 and 1910 the plaintiff made the defendant's acquaintance in connection with certain mines

and mining properties which he (the plaintiff) had for sale for others. Nothing came of this. But in the spring of 1910 the plaintiff (being under contract to go to England to sell some mining securities) suggested to the defendant that while there he might hear of copper properties that would interest him. The defendant told the plaintiff that if he did hear of such properties while in England, he (the defendant) would be glad to know about them. He then explained to the plaintiff in detail the scheme which he had in mind.

While in England the plaintiff devoted a good deal of his time to searching for mining properties of the kind the defendant wished to obtain. In the course of this search the plaintiff made the acquaintance of one Plews, who was the managing director of a company which owned a copper property in Chile, not at Chuquicamata. The plaintiff cultivated Plews's acquaintance and told him that he was trying to obtain for another person low grade copper properties where there was a possibility of great tonnage. The defendant came to Europe in the summer of the same year and while he was there the plaintiff brought Plews and the defendant together. From an inquiry made by the defendant of Plews later on, the defendant learned of the atacamite properties here in question owned by Compania de Cobres de Antofagasta and by the Sociedad Explotadora de Chuquicamata. These properties consisted of about seven hundred and fifty-six acres, two hundred and thirty of which was owned by the Cobres company and five hundred and twenty-six by the Explotadora company. The plaintiff and the defendant were much together while they were in London. On the day before the defendant was to sail for home, the plaintiff suggested to him that he should employ him (the plaintiff) "regularly." As a result of this suggestion the defendant wrote out and handed to the plaintiff on the morning of the day on which he left London to take the steamer for the United States, the letter the material part of which is set forth above. It is not necessary to state in detail what was done thereafter by the defendant personally and through others including the plaintiff. It is enough to say that on March 27 and April 3, 1911, the Cobres company and the Explotadora company executed formal options in favor of the plaintiff upon the lands at Chuquicamata owned by them respectively.

By these options the defendant was given the right to examine the properties during periods ending nine months from the dates of the respective contracts. If on examination the properties were found to be satisfactory to him, the defendant agreed, within a year of his giving notice to the company in question of his intention so to do, to erect a plant capable of treating two hundred and fifty tons of ore a day and to pay a royalty of twenty-five per cent of the net profits of the undertaking, guaranteeing that the royalty should be not less than £5,000 a year. The defendant was given the further right to buy each property within four years and nine months from the dates of the respective contracts for £50,000 and a ten per cent share in the capital of the company which took over the property in question. The nine months' investigation period was afterwards extended for twelve additional months. During the investigation period the plaintiff in each case was to be lessee of the property.

The defendant was satisfied that the properties owned by these two companies could not be operated successfully unless they were operated together and operated on a large scale; and in addition that a large water power would have to be obtained and brought from a distance to treat the ore by the Bradley process. Further he was of opinion that to make it a well rounded enterprise other adjoining mining properties of smaller extent would have to be obtained. These matters were matters which (among others) were entrusted by the defendant to the plaintiff during three months that he was in Chile, where he went on the defendant's business in 1911.

With a view to procuring the necessary mining organization and the money necessary to carry the adventure through, the defendant had been in negotiation with Daniel Guggenheim, a member of the firm of Guggenheim Brothers of New York, during the year 1911. By January, 1912, the defendant was satisfied that the rights which he had acquired were actually worth at that time "far in excess of \$20,000,000," and on January 9 of that year he made a written offer to Daniel Guggenheim in substance to this effect: Daniel Guggenheim within ten days was to organize a corporation to be known as the Chile Exploration Company with a capital stock of ten thousand shares of \$100 each, all of which was to be issued to the defendant in payment of the defendant's

options and rights; five thousand shares were to be handed to Daniel Guggenheim and five thousand were to be kept by the defendant. Daniel Guggenheim was to lend to the Exploration company \$40,819.73, being the amount theretofore expended by the defendant in the undertaking, and also all money necessary to be expended in the future in making a thorough test of the property. The \$40,819.73 was to be repaid by the Exploration company to the defendant. Daniel Guggenheim was to be under an obligation to continue in the enterprise only so long as he thought it advisable to proceed with the investigation. There was a further provision that when Daniel Guggenheim was satisfied that the ores on the property could be treated at a profit, he should organize a corporation to be known as the Chile Copper Company with a capital stock of four million shares of \$25 each, one million of which was to be reserved to retire bonds to be issued to raise money for operating the company and the other three million was to retire the stock of the Chile Exploration Company on the basis of three hundred shares of the Copper company for one share of the Exploration company.

This offer was accepted. The Chile Exploration Company was organized. On January 17, 1912, the defendant assigned and conveyed to it all his right and interest: (1) in the option granted to him by the Cobres company; (2) in the option granted to him by the Explotodora company; (3) in two other options (covering smaller acreages) specifically described, and "also in and to all other options, denouncements, petitions, grants, concessions for mines, mill sites, limestone and salt areas, water springs, water power locations at or within fifty miles of Chuquicamata obtained by or for me, directly or indirectly." Thereupon drills were sent to South America and a thorough investigation made of the extent and character of the ore on these Chuquicamata mining properties. The result of this investigation was that on September 10, 1912, Daniel Guggenheim and the defendant, being then in Paris and acting on reports which had been made to them, determined that it was wise to exercise the options. On or about October 3, 1912, the title to the Cobres company property was taken over on payment to it of £90,000 paid and accepted in lieu of £50,000 and a ten per cent share in the capital stock of the company specified in the option, and on October 26, 1912, title to the Explotodora

property was taken over on payment of a like sum, a like agreement having been made with that company. It was intended that these conveyances should be made to the Chile Exploration Company. But it was found that the necessary steps had not been taken to enable that company to hold title to land in Chile and the conveyances were actually made to third persons in trust for the defendant who was to hold for the Exploration company. In his report the master stated that "The Chile Exploration Company at the close of these hearings on May 4, 1916, still remained the owner of the Chuquicamata property acquired as above stated and then was the actual operating company doing business in Chile."

In the course of a conversation between the plaintiff and the defendant which took place in April, 1912, the plaintiff stated that he was entitled to an interest in the Chuquicamata property and the defendant stated that he was not. The defendant further stated that the plaintiff did not bring Chuquicamata to the defendant's attention and knew nothing about it until he, the defendant, brought it to the plaintiff's attention. The result of this and conversations which followed it was that on May 6, 1912, a new agreement was made between the plaintiff and the defendant. So far as is material to the questions which are now before us for decision that agreement was as follows: It contained a recital of the execution of the agreement between the plaintiff and the defendant set forth in the letter of September 14, 1910; a recital of the fact that the plaintiff "did in the month of September, 1910, by means of certain reports submitted to him by others bring to the notice of said Albert C. Burrage a certain copper deposit owned by the Compania de Cobres de Antofagasta at Chuquicamata in the Republic of Peru in South America, and also later to other copper deposits in the Chuquicamata District known as the Aurelia, the Tres Marias, the Riquessa, the Rosario, del Llano, the San Luis, the Flor del Bosque and other mineral deposits," and a recital to the effect that the plaintiff and the defendant both desired to cancel said understanding and substitute therefor the following agreement, namely: That on the 6th day of May, 1913, the defendant should assign to the plaintiff "five per cent. (5%) of all securities, whether in the form of cash, bonds, preferred or common shares, accruing in any way to him as net

profit from the exercise of such options on all such properties at said Chuquicamata or any extensions or alterations thereof, or from the sale or transfer thereof to other persons or corporations, or that, instead thereof, at the sole option of said Albert C. Burrage, the said Albert C. Burrage will give, transfer and convey to said Louis Ross the sum of one hundred thousand dollars (\$100,000.) cash in the lawful currency of the United States of America, or if said Albert C. Burrage shall not have given, assigned, transferred or conveyed his said options on said properties at said Chuquicamata or his interest therein, then said Albert C. Burrage shall give, assign, transfer and convey to said Louis Ross an undivided one-twentieth ($\frac{1}{20}$) interest in all his said options on or interest in said properties, or, instead thereof, at the sole option of said Albert C. Burrage, an undivided one-twentieth ($\frac{1}{20}$) part of the common shares of a corporation holding such options and interest and the preferred stock of each corporation [which] shall represent at the par value thereof the actual money expended by said Albert C. Burrage for such options and interests, or relating thereto, or the optioning, examining, exploring and developing thereof."

On February 4, 1913, the plaintiff then in England mailed to the defendant a letter dated and written January 17, 1913, complaining of the defendant's treatment of him in regard to Chuquicamata, charging the defendant with misrepresentation and concealment of facts and demanding of the defendant (so far as this case is concerned) five per cent of the common shares of the Chile Exploration Company and its successor the Chile Copper Company. On May 6, 1913, the defendant made tender to the plaintiff's agent of \$100,000. This tender was refused. This bill was filed on May 28, 1913. The case was sent to a master on June 27, 1913. The master's report was filed on June 13, 1918, and a supplemental report (on the case being recommitted to him) was filed by the master on September 23, 1918. The case was reserved for the consideration of this court on the master's reports and the defendant's exceptions thereto. No exceptions were taken by the plaintiff.

The plaintiff contended before the master that the agreement of May 6, 1912, was not binding upon him because it was procured by false representations made by the defendant to him.

The master found that "no false representations were made by the defendant to the plaintiff." The plaintiff makes no contention now on the issue of these false representations but he contends that this agreement is not binding on him for other reasons.

The first ground on which the plaintiff now contends that the agreement of May 6, 1912, is not binding on him is that the relation between the plaintiff and the defendant was a fiduciary one and that the defendant failed to make the disclosures due to him from the defendant as one standing in a fiduciary relation to him. The master found in great detail what the defendant knew and what he did not know on May 6, 1912, and what the defendant failed to disclose to the plaintiff at that time. It is not necessary to state these findings in detail. It is enough to say that on these findings there was a failure on the part of the defendant to make such disclosures to the plaintiff as ought to have been made by the defendant if the defendant had stood in a fiduciary relation to the plaintiff. The ground of the plaintiff's contention in this connection is that the concluding paragraph of the letter of September 14, 1910, made the plaintiff and the defendant joint adventurers and brought into being a relation between the plaintiff and the defendant by which the defendant held a fiduciary relation to the plaintiff. This contention is wholly without merit. Nothing is better settled than the doctrine of *Denny v. Cabot*, 6 Met. 82. And by the doctrine of *Denny v. Cabot*, five per cent of common shares provided for in the concluding paragraph of the letter of September 14, 1910, was compensation to be made by the defendant as employer to the plaintiff as employee in addition to his salary of \$500 a month and his travelling expenses when away from Boston. Without question the case at bar comes within the decision in *Denny v. Cabot*, and that decision has been continuously affirmed by subsequent decisions of this court and never has been questioned. *Bradley v. White*, 10 Met. 303. *Holmes v. Old Colony Railroad*, 5 Gray, 58. *Fitch v. Harrington*, 13 Gray, 468, 474. *Emmons v. Westfield Bank*, 97 Mass. 230, 242. *Ryder v. Wilcox*, 103 Mass. 24. *Haskins v. Warren*, 115 Mass. 514. *Commonwealth v. Bennett*, 118 Mass. 443, 453. *Zeigler v. Day*, 123 Mass. 152. *Partridge v. Kingman*, 130 Mass. 476. *Estabrook v. Woods*, 192 Mass. 499.

The main reliance of the plaintiff in support of the contention that the defendant and the plaintiff were joint adventurers is to

be found in the opinions of Vice Chancellor Howell in *Jackson v. Hooper*, 6 Buch. 185, 197; Vice Chancellor Pitney in *Warwick v. Stockton*, 10 Dick. 61, and of Laughlin, J., in *May v. Hettrick Brothers*, 181 App. Div. (N. Y.) 3. There are statements in these opinions that a fiduciary relation exists between joint adventurers as well as between partners. But there is nothing in these cases nor in the other cases relied upon by the plaintiff which even gives color to the contention that an employer who agrees to pay an employee by way of additional compensation a specified percentage of the profits of his (the employer's) adventure becomes a joint adventurer with the employee. It affirmatively appears from the opinion of Laughlin, J., in *Stewart v. Auerbach*, 148 App. Div. (N. Y.) 222, 223, that that judge was of opinion that no such relation comes into existence in such a case. The difference between a joint adventurer and a partner is that in case of a joint adventure the persons in question are interested in a single adventure, while they are interested in carrying on business together generally in the case of a partnership. *Denny v. Cabot* and the doctrine established by that case are decisive authorities against the relationship being that of joint adventurers in a case where the employer and employee are joint adventurers if not employer and employee as much as they are decisive authorities against the relationship being that of partners in a case where they are partners if not employer and employee. We have examined all the other cases cited by the plaintiff in this connection and find nothing in them which calls for further notice.

The next way in which the plaintiff now seeks to get rid of his agreement of May 6, 1912, is that "the conditions entitling the plaintiff to a percentage of common shares of the Chile Exploration Company had been fully performed on May 6, 1912." If that had been the fact, the result would have been that on May 6, 1912, the defendant would have held in trust for the plaintiff two hundred and fifty of his five thousand shares of the Exploration company, the bargain of May 6, 1912, would have been a bargain between a trustee and *cestui que trust* and on the facts found by the master as to the disclosure or rather non-disclosure on the defendant's part the bargain could be avoided by the plaintiff. But we are of opinion that "the conditions entitling the plaintiff to a percentage of common shares of the Chile

Exploration Company had not been fully performed on May 6, 1912," that on that day the relation of trustee and *cestui que trust* did not exist between the defendant and the plaintiff, but on the contrary that on that day the plaintiff and the defendant were dealing together at arm's length.

On May 6, 1912, the Chile Exploration Company had not taken over "the properties" of the Cobres company and the Explotodora company but options on those "properties." The defendant's promise of September 14, 1910, was to give the plaintiff five per cent of the common shares if any received by him "as profit" on a company taking over the "properties" brought to the defendant (*inter alia*) by others through the plaintiff. That meant and means that, if the defendant succeeded in making a profit in common shares by reason of "properties" brought to him by others through the plaintiff being taken over by a company, the plaintiff should have five per cent of such common shares. On May 6, 1912, "properties" had been brought to the defendant's attention by others through the plaintiff but they had not been taken over by a company at that time. The transaction had not been carried to a conclusion and a profit in common shares realized. The transaction at that time had gone no further than the preliminary stage of options having been obtained and assigned in order that a proper investigation might be made of the "properties" to determine whether the company would or would not take over the "properties." Guggenheim, in consideration of the defendant giving him a half interest in the property, had agreed to advance the money to pay the defendant what he was out of pocket in obtaining the options and the money necessary to make the investigation which had to be made to determine upon the wisdom of taking over the "properties." The machinery adopted by the defendant and Guggenheim to carry this agreement into effect was to organize a corporation to carry on the investigation, and that same corporation was to take over the "properties" in case the investigation showed that it was wise to do so. The plaintiff's right to five per cent of common shares under the agreement of September 14, 1910, was not to come into existence until the options had been exercised and the "properties" taken over. If the agreement of May 6, 1912, had been made after October 26, 1912, when the "properties" of both companies had been con-

veyed to the Exploration company and paid for by it, it is hard to see why the defendant would not have held two hundred and fifty of his five thousand shares in the Exploration company in trust for the plaintiff. But on May 6, 1912, when the agreement between the plaintiff and the defendant was made, the defendant held the five thousand shares of the Exploration company issued to him as his own, and the relation which he bore to the plaintiff was that of a master who had agreed to pay his servant in addition to a salary of \$6,000 a year and his travelling expenses when away from home, five per cent of the shares received by him as profit when the "properties" with respect to which the servant was employed had been taken over by a purchaser.

Finally the plaintiff seeks to avoid the effect of the agreement of May 6, 1912, on the ground that the clause in that agreement by which the defendant agreed that if he "shall not have given, assigned, transferred or conveyed his said options on said properties at said Chuquicamata or his interest therein" on May 6, 1913, then in that event the defendant would assign to the plaintiff an undivided one twentieth interest in all his said options on or interests in said properties or instead thereof at the sole option of the defendant an undivided one twentieth part of "the common shares of a corporation holding such options and interest, and the preferred stock of each corporation [which] shall represent at the par value thereof the actual money expended by said Albert C. Burrage for such options and interests, or relating thereto, or the optioning, examining, exploring and developing thereof." The contention of the plaintiff in this connection is that the very insertion of that clause in the agreement was a misrepresentation because on January 17, 1912, the defendant had assigned all his options and interests in the Chuquicamata companies to the Chile Exploration Company. If a promise that if something shall not have taken place which has taken place is a representation that that fact has not taken place, it is hard to see why this is not a misrepresentation of fact. But there is no finding by the master that the plaintiff relied upon this misrepresentation (if it was a misrepresentation) in signing the agreement of May 6, 1912, and on the facts found by the master no such finding should be made by us. It is necessary for the plaintiff to prove that he did rely upon it to make out a right to avoid an agreement by reason of a

misrepresentation. See, for example, *Harrington v. Smith*, 138 Mass. 92; *Fotler v. Moseley*, 179 Mass. 295. Under these circumstances it is not necessary to consider whether under the findings of the master as to what the plaintiff knew and did not know at that time, the misrepresentation was a material one.

The result is that the plaintiff is bound by the agreement of May 6, 1912. Under that agreement the defendant had the option of paying the plaintiff \$100,000 or of transferring to him five per cent of the securities coming to him as profit from the exercise of the options. This payment or transfer was to be made on May 6, 1913. Before that date the defendant elected to pay the plaintiff \$100,000. The plaintiff is entitled to a decree directing the defendant to pay him that sum forthwith. Under all the circumstances of the case no costs should be allowed to either party.

Decree accordingly.

MARY FIORNTINO vs. FRANK S. MASON, trustee.

Suffolk. March 3, 1919. — September 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Landlord and Tenant.

Discussion by RUGG, C. J., of liability of landlord in case of tenancy at will for personal injuries caused by want of repairs.

In an action by a tenant at will of a portion of a house of the defendant for personal injuries sustained in descending an outside flight of steps which were a part of the premises let to the plaintiff, there was evidence that the accident occurred by reason of a defective condition of the steps, but there was no evidence that the defendant knew or had notice of any defect. The plaintiff testified that at the time of the letting the defendant said that "he would care for the house and fix everything right along good and safe" and that he would repair any time "you want." The defendant testified that, if he "knew there was a step broken or in condition to be dangerous," he "would fix it." It was held that the evidence warranted no further finding than that the defendant undertook to make necessary repairs on notice from the tenant, or possibly, if a defect came under his own observation, and did not warrant a finding that the defendant assumed the obligation of retaining such control of the premises as would enable him continuously to make sufficient inspection to detect and correct incipient defects, and that judgment should be ordered for the defendant.

TORT, against the owner, as trustee, of the house numbered 466 on Main Street in the part of Boston called Charlestown, for personal injuries sustained by the plaintiff on June 6, 1913, when the plaintiff was descending an outside flight of steps, which with the platform to which they led were a part of the portion of the defendant's house that was occupied as tenants at will by the plaintiff and her husband with their children. Writ dated July 17, 1914.

In the Superior Court the case was tried before *J. F. Brown, J.* The evidence in regard to the cause of the accident and the condition of the steps was conflicting. The portion of the evidence relating to the defendant's obligation to repair the steps is described in the opinion. There was no evidence that the defendant knew or had notice of any defect in the steps.

At the close of the evidence the defendant made a motion asking the judge to order a verdict for the defendant. The judge denied the motion and the jury returned a verdict for the plaintiff in the sum of \$3,500. The defendant alleged exceptions.

The case was argued at the bar in March, 1919, before *Rugg, C. J., De Courcy, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices.

C. S. Knowles, for the defendant.

W. J. Patron, for the plaintiff.

Rugg, C. J. The plaintiff occupied as tenant at will the second floor of a house of the defendant. A part of the premises let to her was a platform with outside uncovered steps. There was evidence tending to show that the plaintiff while carefully descending the steps was injured by reason of their defective condition.

The kinds of relations between landlord and tenant which have arisen in our decisions out of oral contracts establishing a tenancy at will may be divided into three general classes:

First. The ordinary oral contract for tenancy at will without further agreement. The respective rights and obligations of the landlord and tenant under such a contract for a tenancy at will are well settled. There is no implied agreement, apart from fraud, that the demised premises are or will continue to be fit for occupancy or safe and in good repair. The tenant takes the premises as he finds them and there is no obligation on the landlord to make repairs. The landlord is not liable for injuries arising from a

defective condition unless he has undertaken to make repairs and has made them negligently. *Kearines v. Cullen*, 183 Mass. 298. *Mackey v. Lonergan*, 221 Mass. 296.

Second. The parties may agree that the landlord shall make necessary repairs during the tenancy and thus vary the rights and obligations implied by the law as part of the ordinary relation of tenancy at will. An agreement to repair as a part of the letting is an agreement to make repairs on notice. Failure to comply with such agreement gives rise merely to a right of action for breach of contract, where the damages commonly are only the cost of making the repairs. A negligent omission to repair is not ground for an action of tort. *Tuttle v. Gilbert Manuf. Co.* 145 Mass. 169. The landlord under such a contract is not liable for personal injuries resulting from a defective condition of the premises unless he makes repairs and makes them negligently. *Conahan v. Fisher*, 233 Mass. 234, where cases are collected.

Third. The parties may make a still different agreement to the effect that the landlord shall keep and maintain the premises in a condition of safety on his own responsibility and without reference to notice from the tenant of defective conditions, and by virtue of the agreement for letting shall have and constantly retain such possession of the premises as is necessary for that purpose. It is one thing for a landlord to agree with a tenant that he will make repairs on the demised premises on notice that repairs are needed. That is an agreement of the second class. It is quite another and different thing for a landlord to agree that he continuously undertakes to keep the demised premises in repair and to relieve the tenant from any attention or thought respecting notice of needed repairs, so that the tenant may be as care free respecting the condition of the demised premises as is the guest in a hotel respecting the room assigned for his occupancy. Under such an agreement the landlord assumes the duty of looking after the tenement as to safety and retains so far as necessary to that end the possession thereof and the right to enter upon it at all times. There is nothing impossible in fact or law about such an agreement. *Miles v. Janvrin*, 196 Mass. 431; *S. C.* 200 Mass. 514. It is, however, a most onerous undertaking. See *Ryall v. Kidwell & Son*, [1914] 3 K. B. 135, 142. It is not made out by a simple agreement that the landlord will keep the premises in repair. That

means no more than that he will keep them in repair on notice from the tenant. Such an agreement is of the second class. An agreement of the third class goes much further. It can be supported and proved only by evidence far more explicit than a mere general agreement to maintain in repair. It imposes an obligation on the landlord to enter upon the demised premises at all reasonable times for the purpose of inspection and ascertainment of any defective condition. The landlord thereby assumes direct and initial responsibility for the condition of the premises as to safety at all times. Under such an agreement liability devolves upon the landlord for any failure reasonably to discover and remedy a defect or want of repair whereby injury ensues to any person to whom he owes the duty to inspect, discover and repair defects.

In the case at bar the plaintiff as tenant at will of the defendant seeks to recover by virtue of a contract of the third class. Confessedly she has no right of action under the first or second classes of contracts. The only point to be decided is whether there is any substantial evidence of a contract of that kind.

The plaintiff's testimony respecting her contract with the defendant was this: "He says, — 'don't worry — move in and I will fix it up in good condition and good order and safe, and don't be worried.' . . .—Q. What did he say about fixing the railing on the piazza? A. He says, 'all right — everything is all right — good and safe.' . . .—Q. Did Mr. Mason say anything about what he would do while living there? A. He says my man come and look at the house and what you want done. . . .—Q. Now, did you say anything to Mr. Mason or he say anything to you as to what he was going to do about taking care of the property while you were living there? A. He says he would care for the house and fix everything right along good and safe. That is what he says. . . . And Mr. Mason, he says, All right, and I will keep the house in good condition and fix it up for you good and safe. — . . . Q. And then he said he would repair those stairs? A. Yes, 'I would repair the stairs, and fix the lower stairs way up.' . . . —Q. When you wanted repairs done, did you see Mr. Sweeney or Mason, when Sweeney came to collect the rent? A. When he collect the rent, he ask what I wanted done, and he send a man to fix it.—Q. Whenever you wanted anything done, you told Mr. Sweeney? A. Yes.—Q. And Mr. Sweeney would have it done?

A. Yes. . . .—Q. Now, do you remember whether he did any other things that you didn't ask him to do? A. I asked him when I wanted to fix the stairs and he fixed stairs. . . .—Q. Did he fix anything there that you didn't ask him to fix? A. I asked him if he fixed the stairs, and he fixed the banisters and the lower stairs. —Q. Did he fix everything you asked him to fix? A. Yes — he fixed downstairs.—Q. Did he fix any other things that you did not ask him to fix? A. He fixed nothing only what I asked him. —Q. Was there anything else that he said about it? A. He said he would repair any time 'you want' — good repair and it be kept good — don't worry — and safe. That is what he said — Mr. Mason did." This does not warrant a finding of an agreement on the part of the defendant to look after the property and himself assume with reference to it the obligation of a landlord respecting common stairs and passageways. The only fair import of it all is that the defendant agreed to keep the tenement in good repair when his attention was called to defects by the tenant, or possibly when he knew of defects of his own observation. But it does not go far enough to impose the initial obligation on the defendant as landlord to search for and remedy defects regardless of notice or request from the tenant. If the case stood on the plaintiff's testimony alone, she must fail.

The defendant's testimony was this: "Q. You intend in your dealings with your tenants generally and in this particular case to keep the premises in good order and condition all the time? A. According to the tenant I have.—Q. And particularly with reference to the question of keeping it in such order and condition as to make it reasonably safe, you have no doubt about that at all, have you? A. I always look after that sort of thing.—Q. And Mr. Sweeney was instructed by you to notify you about this and other places, so you didn't wait for the tenant? If you knew there was a step broken or in condition to be dangerous, you would fix it? A. I would fix it.—Q. Didn't you say to Mrs. Fiorntino at that time, — I will do the same thing I have always done, Mrs. Fiorntino, I will keep the place in the usual good condition, and all right and safe? A. Well, anything as general as that I don't remember about, I am sure. . . .—Q. That is what you did intend to do, wasn't it? A. I certainly intended to put the house in repair and look after it.—Q. And keep it in repair? A. I never

made an agreement with her or anybody else on such line as that." This is not fairly susceptible of the inference that the landlord assumed the obligation to retain such control of the premises as would enable him continuously to make sufficient inspection to detect and correct incipient defects. It goes no further, so far as concerns obligations, than to repair on notice from the tenant, or possibly, if the defect came under his own observation. It does not include the right and duty of constant inspection of the premises and continuous prevention from their falling into any want of repair.

The exceptions in the opinion of a majority of the court must be sustained. There appears to have been a full and fair trial. In accordance with St. 1909, c. 236, judgment may be entered for the defendant.

So ordered.

JULIA E. McGRATH vs. GEORGE L. WEHRLE & another.

Suffolk. March 5, 1919.—September 10, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Negligence, Motor vehicle. Agency, Scope of employment. Practice, Civil, Rulings and instructions. Words, "Probably."

In an action for personal injuries from being run into by a motor truck driven by a man in the general employ of the defendant, it appeared that the truck was purchased only four days before and that the driver was accompanied by an instructor furnished by the seller of the truck and had been told by the defendant to learn as fast as he could, that the accident happened after the driver's regular work for the day had been finished and when he was on his way home. The plaintiff argued that, as the driver had been ordered to learn to operate the truck as fast as he could, he could be found to have been receiving such instruction at the time of the accident, although his regular work was over. The judge refused a request to rule that, if the driver of the truck was driving for the sole purpose of going to his own home, he was acting outside the scope of his employment, and instructed the jury instead as follows: "I shall leave the question to you whether on that evening ride [the driver] was acting within the scope of the business of his employer, and I shall say to you probably that unless you find that one of the purposes, one of the objects of that ride was to learn to use the car, that there was nothing here that would warrant you in finding that he was within the scope

of the defendant's authority." *Held*, that the instruction requested should have been given, and that the instruction given was rendered erroneous by the use of the word "probably."

TORT for personal injuries sustained by the plaintiff on June 26, 1915, by being run into by a motor truck alleged to have been operated negligently by a servant of the defendants named Anglin. Writ dated December 18, 1915.

In the Superior Court the action, together with another action against the White Company, from which the defendants had bought the truck, was tried before Fox, J. The evidence is described in the opinion. At the close of the evidence the defendants asked the judge to instruct the jury as follows:

"1. On all the evidence and the pleadings in the case, a verdict should be returned for the defendants."

"3. If, at the time of striking the plaintiff, the operator of the automobile was driving the automobile for the sole purpose of going to his own home, he was acting outside of the scope of his employment, and a verdict should be returned for the defendants."

"5. If, at the time of the accident, Anglin was not engaged in going to where he had been instructed by the foreman, Boucher, to go, he was not acting in the scope of his employment, and the defendants are not liable for his acts and omissions, and a verdict must be returned for the defendants."

The judge refused to give any of these instructions, and, among other instructions, gave to the jury the instruction which is quoted in the opinion.

The judge submitted to the jury the following special question:

"At the time of the accident was Anglin engaged in his employer's business and acting at that particular time within the scope of his employment?"

The jury answered "Yes," and returned a general verdict for the plaintiff in the sum of \$2,000. The defendants alleged exceptions.

The case was argued at the bar in March, 1919, before Rugg, C. J., De Courcy, Crosby, Pierce, & Carroll, JJ., and afterwards was submitted on briefs to all the Justices.

F. R. Mullin, (*P. F. Spain* with him,) for the defendants.

W. B. Grant, (*H. E. Whittemore* with him,) for the plaintiff.

CROSBY, J. The plaintiff, while in the exercise of due care and travelling with her two young children upon a street in that part of Boston called South Boston, was injured by the negligence of one Anglin who was driving a motor truck and who was in the general employ of the defendants. This action and an action against the White Company were tried together. There was a verdict for the plaintiff in this action, and in the case against the White Company the verdict was for the defendants.

The accident happened on Saturday, June 26, 1915, at about eight o'clock in the evening. Anglin had been employed by the defendants as a teamster in delivering goods, and a few days before the accident occurred the defendants had purchased of the White Company the motor truck and Anglin was being instructed by one Cobb (who was in the employ of the White Company) to run it. There was evidence that the instructions so given continued during the four days before the day of the accident; and it was agreed that the White Company should furnish an instructor for the defendants' employees for the period of one week without charge.

The sole question at the trial was whether at the time of the accident Anglin was engaged in his master's business and acting within the scope of his employment. As to this many of the facts are not in dispute. Upon the evidence most favorable to the plaintiff the following could have been found: That Anglin and Cobb reached the defendants' place of business on Leverett Street in Boston, on the evening of the accident, about half past six o'clock, after Anglin had finished for that day his regular work; that he went to the office and got his pay; that the defendants' foreman, one Boucher, "told him to go and pay a bill at a place on Lansdowne Street, Cambridge, for an inner tube that was purchased there the day before;" that Anglin and Cobb then got on the truck, which was outside the defendants' store, and went down Charles Street and stopped at the Evans House, at the corner of Cambridge Street, where they had a drink; that from there they went to a house on Idlewild Street, in Allston, where Cobb roomed, and then went to the White Company's garage to get a spark plug with which to repair the car as it was "skipping;" that they then went to a place on Massachusetts Avenue where they had a drink, and then started to go to Anglin's house in South Boston, and were on their way there when the accident occurred.

Anglin testified that, on the day before the accident, when his application to the highway commission for an operator's license and the certificates accompanying it were filled out, Boucher told him "to learn it as fast as I [he] could." He also testified that Wehrle, one of the defendants, told him to "learn it, that is all." There was evidence that Anglin on the night of the accident had a dozen bottles of beer in a bag which he intended to take home; but it could not properly have been contended that while he was then doing this thing for his own convenience he was engaged in his master's business, and we do not understand the plaintiff so to argue.

The jury in answer to a special question found that at the time of the accident Anglin was "engaged in his employer's business and acting at that particular time within the scope of his employment."

It is the contention of the plaintiff that, as Anglin was instructed to learn to operate the truck as fast as he could and was not expressly limited to receiving such instructions during business hours, he could have been found to have been receiving instructions at the time of the accident; and, if the jury so found, it could also have been found that he was acting within the scope of his employment. His employment generally was limited to the delivery of goods to the defendants' customers during business hours, as directed by the defendants or their foreman.

The defendants excepted to the refusal of the presiding judge to give their third request that "If, at the time of striking the plaintiff, the operator of the automobile was driving the automobile for the sole purpose of going to his own home, he was acting outside the scope of his employment, and a verdict should be returned for the defendants." This was a correct statement of the law and applicable to the evidence. Instead of giving the request, the judge instructed the jury upon this aspect of the case as follows: "Now, having regard to the testimony in this case on one side or the other, I shall leave the question to you whether on that evening ride Anglin was acting within the scope of the business of his employer, and I shall say to you probably that unless you find that one of the purposes, one of the objects of that ride was to learn to use that car, that there was nothing here that would warrant you in finding that he was within the scope of the defendant's authority."

The instruction given did not even in substance cover the request which related to an important issue the jury were required to decide, but it would have been accurate and sufficient if the adverb "probably" had been omitted. In effect, it was equivalent to saying that under the circumstances as stated it was likely the defendants were not liable, although there was room for doubt about it. An instruction that a certain finding probably will not warrant a verdict for the plaintiff, is not equivalent to an instruction that the finding will not warrant such a verdict. The instruction as given did not present to the jury a clear and correct understanding of their duty which would enable them properly to determine the important question of liability.

As the third request was not given either in form or substance, the defendants' exception must be sustained.

So ordered.

ATTORNEY GENERAL *vs.* BOSTON AND ALBANY RAILROAD
COMPANY.

Suffolk. March 5, 1919. — September 10, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

*Corporation, Taxation. Railroad. Boston and Albany Railroad Company.
Words, "Business."*

The Boston and Albany Railroad Company, which leased its entire property to the New York Central and Hudson River Railroad Company (now the New York Central Railroad Company) with the approval of the Commonwealth as given by St. 1900, c. 468, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly is not subject to the tax imposed by that statute, although during the existence of the lease it has exercised the power of eminent domain and has issued bonds for the purpose of making improvements on its road.

INFORMATION, filed in the Supreme Judicial Court on December 3, 1918, by the Attorney General at the relation of the Treasurer and Receiver General against the Boston and Albany Railroad Company, alleged to be a corporation doing business for profit, to collect the additional tax imposed upon the net income of domestic corporations by St. 1918, c. 255.

The case came on to be heard before *De Courcy, J.*, who at the request of the parties reserved it upon the pleadings and the agreed facts for determination by the full court.

W. H. Hitchcock, Assistant Attorney General, for the plaintiff.

G. H. Fernald, Jr., for the defendant.

RUGG, C. J. This is an information brought by the Attorney General at the relation of the Treasurer and Receiver General under St. 1903, c. 437, § 78, to collect taxes assessed under St. 1918, c. 255, § 1, whereby a tax is imposed upon "Every corporation incorporated under the laws of this Commonwealth and doing business for profit." The only question is, whether the defendant during the period here material was "doing business for profit" as these words are used in the statute. The material facts are that the defendant was organized as a corporation under St. 1867, c. 270, by the consolidation of the Boston and Worcester and the Western Railroad corporations. It was empowered to maintain and operate a railroad from Boston through Worcester and Springfield and across the Connecticut River to the western boundary of the Commonwealth. The defendant operated its railroad until 1900, when it leased its entire property to the New York Central and Hudson River Railroad Company, now the New York Central Railroad Company, for the term of ninety-nine years. The consent of the Commonwealth to this lease was given by St. 1900, c. 468. The defendant maintains its corporate existence and organization, holds annually a meeting of its stockholders and meetings of directors from time to time as may be necessary. The lessee furnishes it with an office for the conduct of its affairs, including meetings of its directors. It receives from the lessee the stipulated payments of rent and \$10,000 annually for the maintenance of its corporate organization, pays interest on its indebtedness, the rentals of lines of railroad leased to it, the salaries of its officers, the expenses of maintaining its organization, and dividends upon its stock. It derived in 1917 an income of over \$3,400 from certain securities owned by it and a few hundred dollars from interest on deposits. The lessee, as empowered by the lease, from time to time has filed petitions in the name of the defendant for leave to take land by right of eminent domain under the statute. Authority having been granted, the directors of the defendant as required by the lease have signed locations for the exercise of

eminent domain, which have been filed as required by law by the lessee. The initiative in all such matters in accordance with the lease is taken by the lessee. The power of eminent domain has been exercised thus three times in 1917 and five times in 1918. Once in 1917, at the request of the lessee and as provided in the lease, the defendant petitioned the public service commission for authority to issue bonds to the amount of \$1,000,000 for the purpose of making improvements on the road. Authority was granted and the defendant issued the bonds, the interest on which will be paid by the lessee as a part of the rent. The moneys received from the bonds were paid to the lessee for improvements made by it on the railroad, all as required by the lease.

It was said in *Goddard v. Chaffee*, 2 Allen, 395, that "'Business' is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living." *Allen v. Commonwealth*, 188 Mass. 59. "Business" has been said to be "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit." *Flint v. Stone Tracy Co.* 220 U. S. 107, 171. The meaning of a "corporation . . . organized for profit and . . . engaged in business," as those words are used in the corporation tax law of the United States of 1909, 36 U. S. Sts. at Large, 112, 117, has been before the federal courts frequently. The words of that act are similar to those in the statute here under consideration. They both occur in enactments establishing taxation. They presumably have a like significance. The decisions of the United States Supreme Court are instructive in this connection. In *Cedar Street Co. v. Park Realty Co.* 220 U. S. 107, the company was organized generally to develop, sell, lease and deal in real estate and personal property. Its business was confined to the management and leasing of a single hotel; but this was held to be doing business. In *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, a corporation owning a parcel of real estate leased for one hundred and thirty years, whose only activity was to receive and distribute the rent from time to time among its stockholders, was said practically to have gone out of business and hence not to be subject to the tax. In *McCoach v. Minehill & Schuylkill Haven Railroad*, 228 U. S. 295, a railroad corporation had been leased for nine hundred and ninety-nine years to another corporation upon terms in their general features similar to the terms of the lease by

the defendant. The operation of the railroad was turned over to the lessee. The activities of the lessor were the maintenance of its corporate existence, the holding of annual meetings by stockholders, the election of a board of managers, a secretary and treasurer, the receipt of rental, interest on deposits and the maintenance of a contingent fund from which an annual income of about \$24,000 was received, payment of salaries of its officers and clerks, office rents and other expenses of maintaining its corporate existence. It was held, against a strong dissent by three justices, that the corporation, having leased all its property to another and doing only what was necessary to receive and distribute its income among its stockholders, was not doing business within the meaning of the act. The question whether the exercise of eminent domain would constitute doing business was left undecided. In *United States v. Emery, Bird, Thayer Realty Co.* 237 U. S. 28, the only business done by a real estate corporation was to keep up its corporate organization and to collect and distribute the rent received from its single lessee. This was held not to be doing business. In *Von Baumbach v. Sargent Land Co.* 242 U. S. 503, the previous decisions were reviewed and the test derived from a consideration of all of them was said at page 516 to be "between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes." To the same effect respecting a similar statute is *People v. Sohmer*, 217 N. Y. 443. See *West End Street Railway v. Malley*, 158 C. C. A. 581; 246 Fed. Rep. 625. While those decisions of the Supreme Court of the United States are not binding upon this court and do not cover exactly the point here presented, they relate to the construction of a statute so closely analogous to that involved in the case at bar, both in its phraseology and purpose, as to be strongly persuasive touching its meaning.

A franchise to be a corporation was granted to the defendant for the purpose of building and operating a railroad for the accommodation of the public. That was the dominant aim of its organization. It could not, merely of its own volition, sell, mortgage or lease its property or franchise in such way as to deprive

itself of the power of accomplishing the ends for which it was created. *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. *Richardson v. Sibley*, 11 Allen, 65. *Middlesex Railroad v. Boston & Chelsea Railroad*, 115 Mass. 347. *Davis v. Old Colony Railroad*, 131 Mass. 258, 271. Leasing of its entire property was not one of these ends. The approval of the Commonwealth was a prerequisite to the validity of the lease of the defendant. That lease so approved stripped the defendant of power to operate its railroad and to perform most of the public services which justified its corporate existence. "The question is rather what the corporation is doing than what it could do." *United States v. Emery, Bird, Thayer Realty Co.* 237 U. S. 28, 32. Manifestly the defendant is not now doing the main business for which it was organized. All its powers as a railroad are not abrogated and annulled by the lease and the statute. It still holds railroad properties under lease to itself, remains bound by the terms of such leases and pays the stipulated rentals. It still possesses power to issue bonds and to take property by eminent domain. It exercises that power. Although I am not free from doubt on this point, the court are of opinion that these limited corporate functions remaining to it, which it still exercises, are not a doing of business for profit. The seizure or purchase of property at the request of the lessee in accordance with the obligation impressed on the lessor by the terms of the lease and the approving statute are necessarily for the benefit of the lessee. Whatever profit there may be accrues wholly to the lessee. Improvement of the railroad property by taking land for increased trackage, the building of freight houses and stations, was for the advantage of the lessee. These acts do not redound in any particular to the profit of the lessor. They do not enable it to receive any additional gain or advantage beyond the rental reserved in the lease. Even as to these powers to exercise eminent domain and to issue bonds, it has no right of initiative. It can act in these matters only at the instance of the lessee. Its conduct is but an automatic reflection of determinations conceived, instituted and carried into final effect by the lessee. The exercise of these attributes by the lessor is the act of a naked repository of corporate power, dormant so far as any possibility of profit to itself is concerned.

Under our law a corporation cannot be organized merely for letting a railroad. When a corporation established for the operation of a railroad is permitted by the sovereign power to retire utterly from that business, to become wholly inactive respecting it, and to be simply the quiescent recipient of a fixed income from a single permanent investment, it is difficult to say with due regard to the meaning of words that such a corporation is conducting business for profit. Its charter has not been changed. The corporation is not authorized to embark in a new business. The lease, however, approved by the Commonwealth, is a surrender during that term of its ordinary powers as a railroad corporation and a transfer of its business activities to the lessee. That which it continues to do is not business for profit according to common understanding. It makes no further efforts in the pursuit of gain, because the Commonwealth has approved the suspension of all its profit making attributes and functions in return for a fixed revenue, all the expenses of the collection and distribution of which are borne by the lessee. It exercises none of the distinctive functions of a railroad corporation. Its corporate energy is reduced below the point of conducting business for profit.

This conclusion is in harmony with several decisions of Circuit Courts of Appeal. In *Anderson v. Morris & Essex Railroad*, 132 C. C. A. 327; 216 Fed. Rep. 83, it was held that the issuance of bonds by the lessor corporation in accordance with the requirements of the lease, in addition to maintenance of corporate organization and receipt of rentals, did not constitute a doing of business under the act of Congress. In *New York Central & Hudson River Railroad v. Gill*, 134 C. C. A. 558; 219 Fed. Rep. 184, and in *Lewellyn v. Pittsburgh, Bessemer & Lake Erie Railroad*, 137 C. C. A. 617; 222 Fed. Rep. 177, the exercise of eminent domain, in *Traction Companies v. Collectors of Internal Revenue*, 139 C. C. A. 360; 223 Fed. Rep. 984, the issuance of stock and bonds and joining in conveyances of property, and in *Jasper & Eastern Railway v. Walker*, 151 C. C. A. 469; 238 Fed. Rep. 533, the expenditure of certain moneys in improvements, in each case in addition to the usual acts of a lessor corporation in maintaining its organization and collecting and distributing rent, were held not to be a doing of business.

There is nothing at variance with this result in *Copper Range*

Co. v. Commonwealth, 218 Mass. 558. The salient facts of that case were that a business corporation was organized for the express purpose of holding the stocks and securities of other corporations. That was its business. Manifestly the doing of the precise thing for which a business corporation is chartered is doing business. The income of a corporation not doing business for profit is not within the scope of the present statute, even though such corporation may fall within the general classification of business corporations.

Information dismissed with costs.

ATTORNEY GENERAL vs. WARE RIVER RAILROAD COMPANY.

Suffolk. March 5, 1919. — September 10, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Corporation, Taxation. Railroad. Ware River Railroad Company.

The Ware River Railroad Company, which was organized under St. 1867, c. 76, and before the completion of its road leased its entire property to the Boston and Albany Railroad Company for the term of nine hundred and ninety-nine years from 1874, and which never operated its road, but which receives from the lessee a sum not exceeding \$500 a year for the reasonable expenses of maintaining its corporate existence and an annual rent of \$52,500, all of which is paid in dividends to its stockholders, and has no other source of income, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly is not subject to the tax imposed by that statute.

INFORMATION, filed in the Supreme Judicial Court on December 3, 1918, by the Attorney General at the relation of the Treasurer and Receiver General against the Ware River Railroad Company, alleged to be a corporation doing business for profit, to collect the additional tax imposed upon the net income of domestic corporations by St. 1918, c. 255.

The case came on to be heard before *De Courcy, J.*, who at the request of the parties reserved it upon the pleadings and agreed facts for determination by the full court.

W. H. Hitchcock, Assistant Attorney General, for the plaintiff.

G. H. Fernald, Jr., for the defendant.

RUGG, C. J. This is an information brought at the relation of the Treasurer and Receiver General to collect taxes assessed under the provisions of St. 1918, c. 255, § 1, whereby a tax is imposed upon "Every corporation incorporated under the laws of this Commonwealth and doing business for profit." The relevant facts are that the defendant was organized as a corporation under St. 1867, c. 76, and authorized by § 2 thereof "to locate, construct, maintain and operate a railroad" between designated points. Before the railroad was completed the defendant leased its entire properties to the Boston and Albany Railroad Company for the term of nine hundred and ninety-nine years from 1874. It has never operated its railroad but maintains its corporate existence and organization and each year holds one meeting of stockholders and of directors. The reasonable expenses of maintaining its corporate existence, not exceeding \$500 each year, are paid to it by the lessee. It receives as annual rent under its lease \$52,500, all of which is paid in dividends to its stockholders. It has no other source of income. During the time here material it did not issue stock or bonds or exercise the power of eminent domain. Its railroad was operated by the lessee up to the time of the lease of that company to the New York Central and Hudson River Railroad Company in 1899. Since then it has been operated by the latter company. The defendant has exercised no other faculties or powers.

This case is much clearer to the effect that the corporation was not "doing business for profit" within the words of the statute than was *Attorney General v. Boston & Albany Railroad*, ante, 460, by which it is governed.

Information dismissed with costs.

MICHAEL J. SUGHRUE, executor, *vs.* FREDERICK BARLOW & others.

HELEN M. BARLOW, appellant, *vs.* SAME.

HELEN M. BARLOW *vs.* FREDERICK BARLOW.

Norfolk. Suffolk. June 23, 1919. — September 10, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Will, Revocation by marriage. Frauds, Statute of.

An alleged will in favor of the person who after its execution became the wife and widow of the alleged testator, and who was induced to marry him by his oral promise to make a will in her favor, is revoked under R. L. c. 135, § 9, by such subsequent marriage, if it does not appear from the alleged will that it was made in contemplation of such marriage.

Such widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and § 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing and an agreement to make a will must be in writing.

APPEAL by one named as executor in an instrument purporting to be the will of Albert Barlow, late of Milton, from a decree of the Probate Court for the county of Norfolk refusing to allow the said instrument as the will of said Albert Barlow; also an

APPEAL by Helen M. Barlow, widow of Albert Barlow, from the same decree; also a

BILL IN EQUITY, filed in the Supreme Judicial Court on April 3, 1911, by the widow of Albert Barlow against a brother of the plaintiff's husband, who was one of his heirs at law, alleging the facts which are stated in the opinion and praying that the defendant be enjoined from contesting the allowance of the will on the ground that it was revoked by the marriage of the plaintiff and Albert Barlow after its execution.

The appeals from the decree of the Probate Court were heard by *Braley, J.*, who found the facts which are stated in the opinion, and at the request of the parties reported the case for determination by the full court upon the pleadings and his findings of fact.

In the suit in equity the defendant demurred to the bill, assigning the following causes of demurrer:

"1. Because the plaintiff has not stated any cause of action nor alleged any facts which entitle her to relief in equity.

"2. Because the plaintiff does not allege that the alleged agreement set forth in the plaintiff's bill was in any way binding upon this defendant, or that he was a party thereto, or had any knowledge thereof.

"3. Because said alleged agreement set forth in the plaintiff's bill is not alleged to be in writing, and, not being in writing, is void under R. L. c. 74, § 1, cl. 3, and R. L. c. 74, § 6, and R. L. c. 153, § 26.

"4. Because, it appearing by the bill that the marriage of the plaintiff to Albert Barlow was subsequent to the making and execution of the will of said Albert Barlow, and it not appearing from the will that it was made in contemplation of marriage, said marriage acted as a revocation of said will by force of R. L. c. 135, § 9.

"5. Because the rights and remedies of the plaintiff are fully prescribed by law, and the plaintiff must resort to such."

The demurrer was argued before *Braley, J.*, who made a final decree sustaining it, reciting that the plaintiff did not care to amend her bill and ordering that the bill be dismissed. The plaintiff appealed.

An order was made by *Braley, J.*, that the two cases should be argued together before the full court.

The cases were submitted on briefs.

D. J. Triggs, for the executor and for Helen M. Barlow.

C. F. Eldredge, for Frederick Barlow.

RUGG, C. J. The material facts are that Albert Barlow, now deceased, in May, 1916, orally proposed marriage to the appellant, then Helen M. Burke, now his widow, promising that if she would marry him "he would make over everything to" her before the marriage, and that if he should die before marriage she would "be taken care of," and if he died after marriage she would "have everything." She accepted his proposal according to its terms. Pursuant to the agreement the deceased executed a will on May 29, 1916, whereby, after making two legacies of \$5 each, the residue of his property was given to Helen M. Burke. This will was

mailed to her by the deceased on June 1, 1916, and she retained it until after his death in July, 1918. The marriage, which took place in August, 1916, was in consideration of his promise to make a will in her favor.

It is provided by R. L. c. 135, § 9, that "The marriage of a person shall act as a revocation of a will made by him previous to such marriage, unless it appears from the will that it was made in contemplation of such marriage." The words of that statute are precisely applicable to the facts of the case at bar. The will conveys no indication whatever by any of its words that it was made in contemplation of marriage and was intended by the testator to be operative notwithstanding his marriage. The statute prohibits the elucidation of the will by anything outside its four corners. The case at bar is indistinguishable from *Ingersoll v. Hopkins*, 170 Mass. 401, by the authority of which it is governed. The marriage of the deceased revoked his will.

The suit in equity, setting forth the agreement and performance by the plaintiff and seeking to restrain the heirs at law from contesting the validity of the will on the ground of the subsequent marriage, sets out no ground for relief in equity. An agreement to make a will must be in writing in order to be valid. R. L. c. 74, § 6. The agreement in the case at bar was not in writing and hence no action can be maintained on it. *Emery v. Burbank*, 163 Mass. 326. *Runyan v. Van Iderstine*, 230 Mass. 428.

An agreement in consideration of marriage also is unenforceable unless in writing. R. L. c. 74, § 1, cl. 3. The plaintiff must fail on this ground. *Chase v. Fitz*, 132 Mass. 359. *White v. Bigelow*, 154 Mass. 593.

Decree of Probate Court affirmed.

Decree dismissing bill affirmed.

CHARLES T. PLUNKETT & another, executors, vs. OLD COLONY
TRUST COMPANY, trustee, & others.

Suffolk. June 23, 1919. — September 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Tax.

The tax imposed by U. S. St. 1916, c. 463, § 201 (39 U. S. Sts. at Large, 777), as amended by U. S. St. 1917, c. 159, § 300 (39 U. S. Sts. at Large, 1002), and U. S. St. 1917, c. 63, § 900 (40 U. S. Sts. at Large, 324), is an estate tax and not a legacy or succession tax, and, where the will of a testator makes no provision in regard to its payment, it must be paid out of the residue of his estate.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 21, 1919, by the executors of the will of William B. Plunkett, late of Adams, praying for instructions as to whether the United States estate tax assessed upon the estate of the testator, amounting to \$72,476.15, was to be paid entirely out of the residue of the testator's estate or whether it should be borne *pro rata* by all the legatees and devisees under the will.

The case came on to be heard before Crosby, J., who reserved it upon the pleadings for determination by the full court.

The case was submitted on briefs.

C. N. Stoddard, for the administrator of the estate of William C. Plunkett and others.

S. H. Pillsbury & R. L. Dana, for the Old Colony Trust Company, trustee, and others.

RUGG, C. J. This case is reserved upon the pleadings for the determination of this court. The material facts are that William B. Plunkett, late of Adams in the county of Berkshire, died testate on the twenty-fifth of October, 1917, leaving as his heirs at law two sons, each of whom had children, and one of whom has since deceased. His will was executed on the fifteenth of September, 1909, the first codicil on the twenty-third of October, 1911, and the second codicil on the nineteenth of July, 1917. None of these testamentary instruments contain any provision respecting the payment of

succession or inheritance taxes under either State or federal laws. The State legacy and succession tax had been enacted before the execution of the will and remained in force as amended at the time of the execution of both codicils. St. 1909, c. 490, Part IV. The federal "estate tax" was enacted shortly before the execution of the last codicil. The estate of the testator was of such size that the federal tax assessed upon it was \$72,476.15. The provision for one son under the will and codicils was a gift outright of property valued at \$14,275, and a gift of property valued at \$382,616.75 to a trustee upon a spendthrift trust, to pay the income to that son during his life, with other life estates at his death and gifts over of the remainder. A legacy amounting to \$126,760 was given to a trustee to hold until the testator's grandchildren should "arrive at the age of twenty-five years respectively," when it was to be divided equally among them. The residue of the estate, valued at \$381,109.72, was bequeathed to the testator's other son. This petition by the executors is brought to determine whether this federal tax which has been paid should be charged entirely against the residue of the estate or apportioned *pro rata* among all the devisees and legatees. That is the single question presented. An important factor in the answer of this question is the meaning of the federal statute on the point whether the tax is imposed with reference to the entire net estate or with reference to the particular devises, bequests or distributive shares.

The tax was established by the act of Congress of September 8, 1916, entitled "An Act to increase the revenue, and for other purposes," as amended by the Acts of March 3, 1917, and of October 3, 1917. The relevant sections of the successive acts are grouped respectively under "Title II, Estate Tax," "Title III, Estate Tax," and "Title IX, War Estate Tax." The tax thus entitled is "imposed upon the transfer of the net estate of every decedent dying after the passage of this Act." § 201. Subsequent sections contain directions for the ascertainment of the net value of estates of deceased persons. Briefly and compendiously stated the net value comprehends all estate left by a decedent within the purview of the act after deducting debts, losses and expenses of administration and an exemption of \$50,000. §§ 202, 203. The tax is in general terms and is a percentage upon the amount

of the net estate. § 201. It is due one year after the death of the decedent. § 204. It must be paid by the executor or administrator, and no direction is found in the act for apportionment among legatees or devisees. § 207. The intent is expressed by § 208 that, unless otherwise directed by will, the tax shall be paid out of the estate before distribution. The tax, if not sooner paid, is made a lien upon the gross estate for a period of ten years, except that it is divested as to such part as is used to defray charges against the estate and expenses of administration when allowed by the court of appropriate jurisdiction. § 209.

The contention that the tax is on the particular devises, bequests or distributive shares is met at the outset by the heading or title given to the tax by the statute itself, which describes the kind of pecuniary imposition levied as an "Estate Tax." This is properly to be considered in interpreting a statute of the United States. *Knowlton v. Moore*, 178 U. S. 41, 65. The sections of the act prefaced by this heading or title refer exclusively to the value of the "net estate" as the basis for the ascertainment of the tax. There is no mention whatever in this connection of legacies, devises or distributive shares. They are wholly omitted. The statute ignores utterly the disposition made of the estate by the testator or by the law as to intestate property, and looks only to the net estate itself as defined.

The words of the act of Congress imposing the tax point strongly toward the interpretation that the tax is on the estate and not on the particular devises, legacies or distributive shares. The words "net estate" are used uniformly in the operative parts of the act to the exclusion of phrases of other significance.

Two considerations fortify this interpretation.

(1) The war revenue act of 1898, being an act approved on June 13 of that year, 30 U. S. Sts. at Large, 464, 465, plainly and by its express words imposed a tax on particular legacies and distributive shares arising from the property left by a decedent and not on the whole personal estate so left. *Knowlton v. Moore*, 178 U. S. 41, 43, 65, 67, 71. The contrast between the terms of that earlier act and those of the present throws a clear light on the meaning of the act here in question. If Congress had intended to levy a tax on legacies and distributive shares, it naturally would have adopted the words of its act of 1898, which

had been already used and whose signification had been established by the highest judicial authority. Employment of other language of quite different import indicates a change of purpose.

(2) It is permissible to examine records of legislative proceedings incident to the passage of a statute to illumine its doubtful language, although its plain meaning cannot be thereby affected; but for this purpose resort commonly cannot be had to the debates of individual members. *Old South Association in Boston v. Boston*, 212 Mass. 299, 305, and cases there collected. *United States v. St. Paul, Minneapolis & Manitoba Railway*, 247 U. S. 310, 318. The design of the framers of the act of 1916 to establish an estate tax as distinguished from a legacy or distribution tax is manifested by the report of the committee on ways and means of the national House of Representatives, to which the revenue bill had been referred. In that report made on July 5, 1916 (Report No. 922, 64th Congress, 1st Session), page 5, under the heading "Estate Tax," are found these words: "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various States, and the same can be readily administered with less conflict than a tax based upon the shares."

An estate tax as distinguished from a legacy or succession tax is well recognized. It was said in *Minot v. Winthrop*, 162 Mass. 113, 124, "the right or privilege taxed can perhaps be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property." The difference between the nature of the two kinds of taxes was pointed out and defined by a quotation from Hanson's *Death Duties*, by the present Chief Justice of the United States in *Knowlton v. Moore*, 178 U. S. 41, at page 49, in these words: "What it [that is, an estate tax] taxes is not the interest to which some person succeeds on a death, but the interest which ceased

by reason of the death." An estate tax is imposed upon the net estate transferred by death and not upon the succession resulting from death. *In re Roebling*, 89 N. J. Eq. 163.

The conclusion seems to us to follow irresistibly that the tax here in question is an estate and not a legacy or succession tax. This is in accord with the decision in *Matter of Hamlin*, 226 N. Y. 407. Although the precise point was not presented for decision in *Corbin v. Townshend*, 92 Conn. 501, 505, *People v. Pasfield*, 284 Ill. 450, 453, *State v. Probate Court of Hennepin County*, 139 Minn. 210, 211, or *Knight's Estate*, 261 Penn. St. 537, 539, in each of those decisions there is a dictum to the effect that this is an estate tax. See, however, *Fuller v. Gale*, 78 N. H. 544.

The provisions of § 208 of the act respecting "a just and equitable contribution" to one from whose share in the estate the tax has been collected "by the persons whose interest in the estate . . . would have been reduced" if the tax had been paid before distribution, or "whose interest is subject to equal or prior liability for the payment of taxes," afford no warrant for applying what may be thought in a special instance to be general equitable considerations in opposition to fixed principles as to the settlement of estates. That section is inapplicable to the facts here disclosed.

The further step follows inevitably from what has been said that the law makes no provision for apportionment of the tax among legatees, but leaves it simply to be paid out of the estate before distribution is made.

The will and codicils of the testator contain no direction respecting the payment of this tax. There is nothing written in any of these testamentary instruments which rightly can be construed as expressing the purpose of the testator on the subject. Although the last codicil was executed after the enactment of the federal taxing law, no reference is found therein touching the payment of the taxes imposed. So far as any inference may be drawn, it would seem to be that taxes were intended to fall where the law placed them. It is not permissible for us to speculate as to the existence of an intent to make a different provision from that provided by law in the absence of any expression of testamentary purpose on the subject. It is the general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the

residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied. *Tomlinson v. Bury*, 145 Mass. 346. The tax is a pecuniary burden or imposition laid upon the estate. *Boston v. Turner*, 201 Mass. 190, 193. In its nature it is superior to the claims of the residuary legatee. Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. *Matter of Hamlin*, 226 N. Y. 407, 418, 419. Decree is to be entered instructing the executors accordingly.

So ordered.

WALTER A. HOPKINS, trustee, vs. JAMES J. MURPHY.

Suffolk. June 23, 1919. — September 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Landlord and Tenant, Eviction.

The presence of cockroaches in an apartment leased for a dwelling, two years after the making of the lease, and an unsuccessful attempt of the lessor to destroy the cockroaches when notified by the lessee of their presence are not evidence of an eviction of the lessee from the apartment.

CONTRACT, brought by the plaintiff, as trustee, on a covenant to pay rent in a lease of the upper of two suites in a house numbered 67 on Winthrop Road in Brookline, to recover rent for the months of February, March and April, 1916, at the rate of \$79.17 per month. Writ in the Municipal Court of the City of Boston dated April 4, 1916.

The answer, among other things, alleged that before the rent mentioned in the plaintiff's declaration became due the defendant was evicted from the premises by the plaintiff "permitting large numbers of vermin or roaches to invade said premises or a substantial part thereof and to continue therein, rendering the premises impossible and dangerous for use for the purposes for which rented."

On removal to the Superior Court the case was tried before

Keating, J. The evidence is described in the opinion. At the close of the evidence the plaintiff moved that a verdict be ordered in his favor. The judge granted the motion and ordered a verdict for the plaintiff in the sum of \$276.28. At the request of the parties the judge reported the case for determination by this court.

If the ordering of the verdict was right, judgment was to be entered for the plaintiff on the verdict; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs.

W. B. Grant & H. E. Whittemore, for the defendant.

R. W. Dunbar, for the plaintiff.

CROSBY, J. This is an action to recover rent under a written lease of the upper suite in a two-family house. The defendant denies liability and contends that he was constructively evicted from the premises by reason of the presence in the suite of large numbers of "roaches," rendering it unfit for occupancy. We understand that "roaches" as described in the record are what are commonly known as "cockroaches." There was no evidence to show that there were any cockroaches in the leased premises until about December 1, 1915, — more than two years after the defendant's occupancy began. It appeared that as soon as the plaintiff was notified by the defendant of their presence, he sent a man to the house to destroy them, but his efforts in that direction were not successful.

It is well settled that in a lease of real estate no covenant is implied that it should be fit for occupation; and this is true of a lease of a building for a dwelling-house. *Royce v. Guggenheim*, 106 Mass. 201, 202. *Pomeroy v. Tyler*, 9 N. Y. St. Rep. 514. *Murray v. Albertson*, 21 Vroom, 167. In the absence of an express agreement between the parties or of fraudulent representations or concealment by the lessor, the lessee takes the demised premises as they exist and the rule of *caveat emptor* applies. *Skally v. Shute*, 132 Mass. 367. *Roth v. Adams*, 185 Mass. 341. To constitute a constructive eviction, it must appear that by his intentional and wrongful act the landlord has deprived the tenant of the beneficial use or enjoyment of the whole or a part of the leasehold. *Smith v. McEnany*, 170 Mass. 26. *Taylor v. Finnigan*, 189 Mass. 568. *Voss v. Sylvester*, 203 Mass. 233. *Nesson v. Adams*, 212 Mass. 429.

The record shows that the demised premises were in a new building and had not been occupied before the defendant's tenancy began, and that no cockroaches were seen there by the defendant until more than two years thereafter. There is nothing to indicate that the plaintiff was responsible for the presence of the insects or that he failed in any duty which he owed to the defendant. His unsuccessful attempt to exterminate them could not be found to be a constructive eviction of the defendant. Everybody knows that cockroaches, ants and other objectionable insects will sometimes appear in dwelling houses to the annoyance of the occupants. It is manifest that the plaintiff was not responsible for the presence of the cockroaches and that he did nothing with the intention and effect of depriving the defendant of the demised premises. Under such circumstances the evidence would not warrant a finding that there was an eviction. The fact that the landlord, upon notice from the tenant, attempted to remedy existing conditions, was a gratuitous act, and was not evidence of an eviction. *McKeon v. Cutter*, 156 Mass. 296, 298.

There was evidence that before the defendant vacated the tenement the plaintiff learned there were cockroaches in the lower suite, occupied by another tenant. When he received this information does not appear. It is not evidence of a constructive eviction.

The cases relied on by the defendant where, by some act of the landlord of a permanent character or by reason of false representations at the time of the letting, the lessee was deprived of the beneficial enjoyment of the demised premises, are plainly distinguishable from the case at bar. *Royce v. Guggenheim*, *supra*. *Sherman v. Williams*, 113 Mass. 481. *Skally v. Shute*, *supra*.

In accordance with the report, judgment is to be entered for the plaintiff on the verdict for \$276.28 with interest to February 27, 1919.

So ordered.

PHILIP E. A. SHERIDAN vs. MASSACHUSETTS FIRE AND MARINE
INSURANCE COMPANY.

Suffolk. June 23, 1919. — September 10, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Agency, Existence of relation. Insurance, Agent, Broker.

An insurance broker, who solicits applications for insurance and delivers them to an agent of an insurance company, which issues policies upon them, is not on these facts an agent of the insurance company.

If an insurance company sends to an insurance broker a notice addressed to a policyholder, for whom the broker had obtained the policy, asking the insured to notify the company in case he wishes to renew his policy, this gives no authority to the broker to bind the insurance company by an oral contract of insurance or by an agreement to issue a policy.

CONTRACT against an insurance corporation, incorporated under the laws of this Commonwealth, on an oral contract, alleged to have been made by one Crowley as the agent of the defendant, insuring a motor car of the plaintiff against fire or theft until a policy for such insurance could be issued, the plaintiff's car having been stolen while such alleged oral contract was in force. Writ dated October 22, 1917.

The answer, besides a general denial, denied specifically that Crowley was an agent of the defendant or was in any way authorized to make temporary oral insurance pending the issuing of policies in writing by the defendant.

In the Superior Court the case was tried before *White, J.* The evidence is described in the opinion. At the close of the evidence the defendant filed a motion that a verdict be ordered for the defendant. The judge allowed the motion and ordered a verdict for the defendant. By agreement of the parties he reported the case for determination by this court with the stipulation that, if the order that the jury return a verdict for the defendant was correct, judgment was to be entered on the verdict, but, if there was any evidence upon which the case should have been submitted to the jury, judgment was to be entered for the plaintiff in the sum of \$500 with interest from the date of the writ.

The case was submitted on briefs.

W. F. Frederick & W. H. Taylor, for the plaintiff.

E. E. Blodgett & F. W. Eaton, for the defendant.

CROSBY, J. In the month of February, 1916, one Crowley, an insurance broker, called upon the plaintiff and solicited from him the placing of a policy insuring the plaintiff's automobile from loss by fire or theft. The plaintiff signed an application therefor which was delivered by Crowley to John C. Paige and Company, the defendant's general agent; and the latter on February 10, 1916, issued to the plaintiff a policy by the terms of which the automobile was insured against loss by fire and theft in the sum of \$800 for one year from February 4, 1916.

In the month of January, 1917, the agent sent to Crowley a notice addressed to the plaintiff informing him that the policy would expire on February 4, 1917, and requesting him, if he desired a renewal, to make an indorsement to that effect upon the notice and return it to the company or to call at its office. This notice was delivered by Crowley to the plaintiff, who inquired what it would cost to renew the policy; Crowley stated that he did not know but "would look it up," and a few days later he informed the plaintiff that the company would reinsure the automobile in the sum of \$500 and that the premium would be about \$21. The plaintiff testified that at this interview he said to Crowley, "All right, John, send me the policy and I am insured;" to which Crowley replied, "Yes. In the meantime we will hold you covered." He also testified that on February 10 and again on February 14, 1917, Crowley told him in substance that the automobile was insured. On February 26, 1917, the plaintiff signed the application above referred to for the renewal of the policy and mailed it to Crowley. The automobile was stolen on the evening of the same day and has not been recovered.

The plaintiff seeks to recover upon an oral contract of insurance. That such contracts are legal and binding has often been held by this court. *Sanford v. Orient Ins. Co.* 174 Mass. 416. *McQuaid v. Aetna Ins. Co.* 226 Mass. 281.

The right of the plaintiff to recover depends upon the question whether there was any evidence to show that Crowley was an agent of the defendant authorized to make the contract on which the plaintiff relies. The undisputed evidence shows that he was

an insurance broker, and as such solicited the plaintiff's application and obtained from the defendant's agent the policy which was issued. This did not constitute him the agent of the defendant. The sending of the notice by the defendant's agent to Crowley was not evidence from which it could be found that the defendant had clothed Crowley with authority to bind the defendant by an oral contract of insurance or by an agreement to issue a policy. The statements made by Crowley to the plaintiff, above referred to, were not admissible to establish the agency of Crowley and could not be binding upon the defendant. *Deane v. American Glue Co.* 200 Mass. 459. *Ennis v. Wright*, 217 Mass. 40. The evidence would not warrant a finding that Crowley had any express or implied authority whatever to act for the defendant. As an insurance broker he could solicit insurance and forward applications to the defendant, but he was not in any sense its agent. If he were the agent of any one, he would seem to have been the agent of the plaintiff, from whom he obtained the original application which he afterwards delivered to the defendant's agent. *Commonwealth Mutual Fire Ins. Co. v. Fairbank Canning Co.* 173 Mass. 161. *Green v. Star Fire Ins. Co.* 190 Mass. 586.

The presiding judge rightly directed the jury to return a verdict for the defendant, and in accordance with the terms of the report the entry must be

Judgment for the defendant on the verdict.

WILLIAM C. BARTLETT vs. FRED M. MOORE & another.

Hampden. June 23, 1919. — September 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Attachment, Of real estate.

Where the plaintiff in an action at law has attached on mesne process an undivided share of the defendant in certain real estate as an heir at law of his mother, and after the attachment and before judgment the administrator of the mother's estate sells the real estate for the payment of debts, retaining a surplus in which the defendant's share is more than sufficient to satisfy the plaintiff's claim, and where the plaintiff obtains judgment and immediately notifies the administrator of his lien and demands payment of his claim from the proceeds of the sale

and within thirty days after the judgment brings a suit in equity to enforce his rights, the plaintiff has established his lien and is entitled to payment out of the proceeds of the sale in the hands of the administrator as against a creditor claiming under a subsequent attachment.

BILL IN EQUITY, filed in the Superior Court on November 26, 1915, alleging that on October 29, 1915, the plaintiff recovered judgment in the Police Court of Springfield against the defendant Fred M. Moore for \$90.70 damages and \$11.87 costs of suit, in an action in which, on July 22, 1915, he had attached all the right, title and interest which the defendant Moore had in real estate in Springfield or elsewhere in the county of Hampden; that at the time of the attachment the defendant Moore owned by descent from his mother Helen E. Moore one undivided third part of certain real estate in Springfield; that on or about August 31, 1915, the defendant Folsom as the administrator of the estate of Helen E. Moore sold said real estate for the payment of debts of the intestate and that there remained in his hands as surplus proceeds from the sale of the defendant Moore's one third interest the sum of \$775.85; that on or about September 30, 1915, the plaintiff notified the defendant Folsom of the pendency of his action in said Police Court and of his attachment of the defendant Moore's property, and demanded that the defendant Folsom hold the share in the proceeds of the sale of said real estate belonging to the defendant Moore to satisfy such judgment, if any, as he might recover in said action; that on or about October 29, 1915, he demanded of the defendant Folsom as administrator the payment of his said judgment against the defendant Moore, which demand was refused; and that afterwards and within thirty days from said October 29 he brought this bill. The bill recited the facts stated below in regard to the claim of the Western Massachusetts Cadillac Company and prayed that it might be made a party and that the plaintiff's rights against it might be determined. There was a prayer that the defendant Folsom as administrator be ordered to pay over to the plaintiff from the funds in his hands and possession belonging to the defendant Moore the amount of said judgment with interest and costs; also a so called

CROSS BILL, filed in the Superior Court on September 12, 1917, by the Western Massachusetts Cadillac Company, alleging that

on April 8, 1915, this plaintiff sued a writ out of the Superior Court in an action of contract brought by it against the said Moore, upon which writ on April 9, 1915, attachment of all the right, title and interest which the said Moore had in real estate situate in said Springfield or elsewhere in the county of Hampden was made, which writ was returnable to the Superior Court on July 30, 1915, as of the first Monday of July, 1915, by agreement of counsel for both said plaintiff and defendant; that this plaintiff on said July 30 filed its petition that a special precept issue, directing the attachment of the goods, effects or credits of the defendant Moore in the hands and possession of the defendant Folsom, administrator, as trustee; that by virtue of such special precept attachment was made by trustee process of the goods, effects and credits of the defendant Moore in the hands and possession of the defendant Folsom as administrator, and he was summoned to appear and answer as alleged trustee on August 31, 1915, and September 9, 1915; that on December 6, 1915, this plaintiff secured judgment in said action against said defendant Moore for \$1,500 damages, without costs, and against said defendant Folsom, administrator, as trustee, by default, he not having appeared or answered; that on January 3, 1916, this plaintiff sued a writ of scire facias against said defendant Folsom, as administrator, out of the Superior Court, and returnable on the first Monday of February, 1916, which writ was duly returned, and upon which judgment was entered against said Folsom, administrator, by default on March 6, 1916, for \$1,522.20 damages, and \$12.51 costs of suit; that this plaintiff's rights in and to the money in the hands and possession of the defendant Folsom are prior to and superior to those of the defendant William C. Bartlett and that this plaintiff is entitled to have said money applied to the payment of the amount of its judgment against the defendant Moore. The cross bill in addition to a prayer for this relief contained prayers, which are referred to in the opinion, for judgment against the defendant Moore and for determination of the company's rights against the defendant Folsom.

The answers both to the original bill and to the cross bill admitted all the allegations contained therein. It appeared by the allegations thus admitted that the plaintiff in the cross bill

abandoned its attachment of April 9, 1915, and sought to pursue its remedy by its attachment by trustee process and by scire facias as stated above.

The case came on to be heard before *Hamilton, J.*, who at the request of the parties reserved and reported it upon the pleadings and the facts admitted therein for determination by the full court of all questions of law arising therefrom.

The case was submitted on briefs.

S. Adams, for William C. Bartlett.

W. H. Brooks, J. P. Kirby & D. H. Keedy, for the Western Massachusetts Cadillac Company.

BRALEY, J. The respective answers having admitted all the plaintiff's allegations, the replications are to be treated as waived, leaving for decision the questions, whether under the original bill complete relief should be given, and, if so, whether the cross bill can be maintained as to the remaining defendants. By the sale for the payment of debts of the intestate the real property, of which the defendant Moore as heir at law was seized of one undivided third part, was converted, and his fractional interest in the land entitles him to the same proportional share in the surplus in the administrator's possession and control.

The plaintiff, a creditor, having attached on mesne process all the heirs' right, title and interest in an action at law on which judgment was duly rendered, and having within thirty days thereafter brought the present bill to enforce his rights, the lien of the attachment on the debtor's share of the proceeds, which is more than enough to satisfy the judgment, although changed in form never has been dissolved and can be enforced in equity. *R. L. c. 167, §§ 38, 55. Wiggins v. Heywood*, 118 Mass. 514. *Hill v. Hill*, 196 Mass. 509, 518. *R. L. c. 148, § 9.*

The lien thus established having been prior to any rights acquired under the attachment by trustee process of the plaintiff company in the cross bill, no case for affirmative relief in any form is made out against the plaintiff in the original bill. *Story, Eq. Pl. §§ 389, 392. Slater v. Cobb*, 153 Mass. 22. The prayers for relief against the defendant Moore and the defendant Folsom, the administrator summoned as trustee, cannot be granted. The company not only has obtained judgment and execution against the debtor, but on scire facias judgment against the

trustee has been entered for the amount of the judgment with costs of suit. R. L. 189, §§ 20, 45. *Mechanics' Savings Bank v. Waite*, 150 Mass. 234. *Brown v. Floersheim Mercantile Co.* 206 Mass. 373, 376.

The result is that a decree is to be entered dismissing the cross bill and ordering that the plaintiff in the original bill is entitled to the amount of his judgment with interest and costs.

Ordered accordingly.

WILLIAM E. STERLING'S (dependent's) CASE.

WILLIAM L. STERLING'S (dependent's) CASE.

LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, *vs.*

RENA E. STERLING.

SAME *vs.* MAUD M. STERLING.

Suffolk. December 4, 1918. — September 11, 1919.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, CROSBY,
PIERCE, & CARROLL, JJ.

Workmen's Compensation Act, Procedure, Jurisdiction. *Equity Jurisdiction*, Bill of review. *Review*, In equity.

Under the workmen's compensation act there is no right of appeal from a decree of the Superior Court based upon a memorandum of agreement approved by the Industrial Accident Board. Following *Dempsey's Case*, 230 Mass. 583.

The right given by R. L. c. 193, §§ 15-19, to have final judgment in civil actions reviewed and vacated is limited to proceedings in courts of common law and does not apply to a decree of the Superior Court made under the workmen's compensation act.

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, by an insurance company with the dependent widow of an employee, by which the insurer agreed to pay to such widow a weekly compensation during a period named for the death of the employee, which appears by the record to have occurred in the course of his employment on a steamship lying at a wharf upon navigable waters, is void for want of jurisdiction, because the injury to the employee was maritime in its nature and not within the scope of the workmen's compensation act; and such decree may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record.

In the case above described it was *said* that, as the decree must be vacated for

error on the face of the record, it was not necessary to determine whether the insurer could maintain a bill in equity to enjoin the enforcement of the void decree.

TWO PETITIONS, filed in the Superior Court on October 1, 1917, to vacate decrees of that court purporting to have been made under the workmen's compensation act ordering the London Guarantee and Accident Company, Limited, to pay to the dependent widows of William E. Sterling and William L. Sterling each \$10 weekly for a period of four hundred weeks from November 2, 1916, in accordance with agreements filed with the Industrial Accident Board on March 21, 1917; also

TWO PETITIONS, filed in the Superior Court on September 6, 1918, by the insurer for leave to file bills of review under general equity jurisdiction praying the court to review the decrees approving the said agreement of compensation; also

TWO BILLS IN EQUITY, filed on September 6, 1918, praying for injunctions to restrain the enforcement of the same decrees.

The petitions to vacate the decrees were heard by *J. F. Brown, J.* The facts and the proceedings are described in the opinion. The petitions were denied as there stated and the insurer appealed.

The bills of review were allowed to be filed by orders made on September 13, 1918. The cases were heard by *J. F. Brown, J.*, who made decrees that the bills of review be dismissed. He also made decrees dismissing the bills in equity. The insurer appealed from all the decrees.

St. 1911, c. 751, Part III, § 4, as amended by St. 1912, c. 571, § 9, is as follows: "If the association and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the Industrial Accident Board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, and St. 1917, c. 297, § 7, is as follows: "Any party in interest may present certified copies of an order or decision of the board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agree-

ment approved by the board, and all papers in connection therewith, to the Superior Court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact, or where the decree is based upon a decision of a member or a memorandum of agreement, and that there shall be no appeal from a decree based upon an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board. Upon the presentation to it of a certified copy of a decision of the Industrial Accident Board ending, diminishing or increasing a weekly payment under the provisions of Part III, section twelve, the court shall revoke or modify the decree to conform to such decision."

The case was argued at the bar in December, 1918, before *Rugg, C. J., Loring, Braley, De Courcy, & Pierce, JJ.*, and afterwards was submitted on briefs to all the Justices.

H. S. Avery, for the insurer.

W. N. Osgood, for the dependent widows.

PIERCE, J. Before November 2, 1916, the London Guarantee and Accident Company, Limited, issued to one T. Owen Tully a policy of insurance under the workmen's compensation act to cover a period from January 3, 1916, to January 3, 1917. On November 2, 1916, William E. Sterling, the deceased husband of Rena E. Sterling, and William L. Sterling, the deceased husband of Maud M. Sterling, employees of the said T. Owen Tully, a carpenter contractor, in the course of their employment while engaged in installing shifting boards on the steamship *Devonian* while the steamship was lying at the wharf in Boston Harbor, at Boston, upon navigable water, came to their deaths through exposure to fumigating gas used on the steamship for the purpose of exterminating rats and vermin before the loading of the ship.

At some time before March 21, 1917, the insurance company and the two widows came to an agreement by which the insurance company agreed to pay to each "\$10 weekly for a period of four hundred weeks," beginning with November 2, 1916. In accord-

ance with St. 1911, c. 751, Part III, § 4, and amendments thereof, these agreements were signed and filed with the Industrial Accident Board on March 21, 1917. They were approved by that board on April 20 and 26, 1917. The insurance company made the agreed compensation payments as they became due up to August 8, 1917, when it learned that the United States Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, in May, 1917, had decided that it was beyond the power of the several States to enact a workmen's compensation act applicable to injuries occurring upon navigable waters. Thereupon the insurance company stopped making payments under the agreements and have made no further payments thereon. The widows and their representatives were advised by the insurance company as to the reasons why the payments were discontinued. Subsequently each of the widows brought proceedings under Part III, § 11, in the Superior Court for a decree on the agreement. After due hearing and in accordance with the statute the petitions of the widows were allowed. Decrees based upon the memoranda of agreement were made on September 5, 1917, and the insurer appealed therefrom. The act makes no provision for appeal from a decree of the Superior Court, such as was here entered. *Dempsey's Case*, 230 Mass. 583.

On October 1, 1917, the insurance company filed petitions and amended petitions in each case to vacate the decrees; it also filed motions in each case to vacate the decrees. These petitions and motions after hearing were severally denied on March 16 and April 18, 1918, and the insurance company in each case severally appealed. It is plain that the petitions and motions to vacate the decrees were denied rightly. The procedure under the compensation act is governed by the practice in equity. *Gould's Case*, 215 Mass. 480. The right first created by St. 1875, c. 33, now R. L. c. 193, §§ 15-19, to have final judgments in civil actions reviewed and vacated in practice is limited to proceedings in courts of law under the forms of the common law as distinguished from suits in equity and criminal prosecutions.

On May 2, 1918, the insurance company filed a petition in each case with the Industrial Accident Board, in which it prayed "that the agreement entered into by the insurer with the widow of the deceased employee be modified and annulled and that the insurer

be forthwith released from the payment of any further compensation by the said Industrial Accident Board;" and it asked for this relief on the ground that "the agreement entered into by the insurer with the dependent was made by mistake of fact and through a misunderstanding as to the meaning of the law." On May 14, 1918, the Industrial Accident Board, after hearing, entered the decision, "The above petition is denied." On May 21, 1918, the insurance company presented to the Superior Court certified copies of the decisions and prayed "that review of said decision be made and a decree entered thereon in accordance with the law and the facts." On September 13, 1918, the cases came on for hearing and it was decreed in each "that the order of the Industrial Accident Board denying the insurer's petition be affirmed." On September 13, 1918, the insurance company appealed from the decrees entered in the above cases.

"The Industrial Accident Board is not a court of general or limited common law jurisdiction; . . . it is purely and solely an administrative tribunal, specifically created to administer the workmen's compensation act in aid and with the assistance of the Superior Court. . . . [It] possesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers." *Levangie's Case*, 228 Mass. 213, 216. The agreement between the insurance company and the widows was an undertaking to pay compensation under the act. It was not an admission of any common law or statutory liability under a claim for damages resulting to the claimants because of the conscious pain, suffering and death of their husbands, the employees, and the amount agreed to be paid was not an adjustment settlement or compromise of an admitted or disputed claim for damages grounded on causes of action outside the scope of the compensation act. The jurisdiction of the Industrial Accident Board under Part III, § 4, to approve agreements regarding compensation, and the jurisdiction of the Superior Court under Part III, § 11, to "render a decree in accordance" with the agreement "approved by the Industrial Accident Board," necessarily rest upon an assumption and the fact that the agreement concerns a compensation for injuries sustained by an employee protected by the act, and then only when the terms of the agreement "con-

form to the provisions of this act." It is fundamental that the Superior Court could not by its decree give validity to an agreement of compensation in its inception void, because not approved by the Industrial Accident Board acting within and under the authority conferred upon it by Part III, § 4 of the act. And of course the agreement is not approved unless the formal approval be also a legal approval and within the jurisdiction conferred on the Industrial Accident Board by the act. It is to be said of the decree of the Superior Court as was said in *Levangie's Case, supra*, of the action of the Industrial Accident Board, "It follows that full performance of the conditions of the act are essential prerequisites to the jurisdiction of the board [court], and that its authority and the statutory limitation upon the exercise of it cannot be enlarged, diminished or destroyed by express consent or waived by acts of estoppel." "Consent cannot give jurisdiction where the law has not given it." *Jordan v. Dennis*, 7 Met. 590. *Gilman v. Thompson*, 11 Vt. 643, 647. The action of the Industrial Accident Board and of the Superior Court was without jurisdiction, was a nullity and void, but the validity of the order and decree cannot be questioned on appeal for the reasons stated in *Dempsey's Case, supra*.

On September 6, 1918, the insurance company filed petitions for leave to file a bill of review in each case. These petitions were allowed and bills of review were filed on September 13, 1918. On October 16, 1918, decrees were entered dismissing the bills of review, and the petitioner appealed.

The fact that the injuries to which the agreements of compensation relate were maritime in their nature and hence not within the scope of the workmen's compensation act under the Jensen decision, *supra*, was apparent on the record when presented to the Superior Court, and also when "in accordance to said agreement" on September 5, 1917, the Superior Court "decreed that the said . . . insurer . . . pay . . . ten dollars weekly for a period of four hundred weeks from November 2nd, 1916." In the opinion of a majority of the court it follows that the decree of September 5, 1917, was void for want of jurisdiction and must be vacated for error on the face of the decree. *Clapp v. Thaxter*, 7 Gray, 384, 386. *Sawyer v. Davis*, 136 Mass. 239, 247.

On September 6, 1918, the insurance company brought bills in

equity to enjoin the two widows from enforcing the decrees of September 5, 1917. Answers were filed and the cases were set down for hearing on bill and answer. After hearing and argument of counsel, each bill was dismissed, and the petitioner appealed. As the decree of September 5, 1917, must be vacated for error on the face of the decree, it is unnecessary to decide whether the petitioner is entitled to injunctive relief. See *Boston Diatite Co. v. Florence Manuf. Co.* 114 Mass. 69; *Palmer v. Lavers*, 218 Mass. 286; *Currier v. Esty*, 110 Mass. 536; *Amherst College v. Allen*, 165 Mass. 178. These bills in equity must be dismissed without prejudice and without costs.

Decrees accordingly.

WALTER K. MARTIN, administrator, *vs.* ALEXANDER OTIS
& others.

Suffolk. May 19, 1919. — September 11, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Evidence, Foreign law, Opinion: experts. Marriage and Divorce.

At a hearing before a master, in a probate appeal where the validity of a marriage in the State of Rhode Island was in issue, certain sections of a statute of Rhode Island were put in evidence which never had been construed by the courts of that State. A member of the bar of Rhode Island testified to his opinion as to the correct construction of the statute. This was the only evidence on the subject except the statute itself. The master stated in his report that, if he was not bound by the testimony of the expert, he should make certain findings as to the validity of the marriage under the statute. *Held*, that the master had the right to disregard the testimony of the expert and to form his own opinion as to the legal effect of the statute.

In the case above referred to the conclusion of the master, disregarding the opinion of the expert, was that the marriage in question was irregular because the ceremony was not performed in the city in which the license was granted as required by a section of the statute of Rhode Island, but that under another section of that statute the marriage, if otherwise valid, was valid in spite of such irregularity, and it was *held* that the master's construction of the statute was correct.

The consummation of a marriage by coition is not necessary to its validity.

In the case above referred to, it also was *held* upon certain findings of the master that the surviving husband, although his marriage to the intestate was lawful, was not a suitable person to administer the estate of his wife and that on this ground a decree of the Probate Court appointing him administrator of her estate should be reversed.

APPEAL from a decree of the Probate Court for the county of Suffolk appointing Walter K. Martin the administrator of the estate of his late alleged wife Emma Angeanette Martin.

The case was referred to a master, who filed a report containing the findings that are described in the opinion. Later the case came on to be heard before *Braley, J.*, who, at the request of the parties, reserved it upon the pleadings, the master's report and the exceptions thereto for determination by the full court.

The case was submitted on briefs.

H. E. Warner, P. L. Stackpole & E. C. Bradlee, for the appellee.

W. H. Dunbar, G. R. Nutter & E. F. McClellenn, for the appellants.

DE COURCY, J. This is an appeal from a decree of the Probate Court for the county of Suffolk appointing Walter K. Martin administrator of the estate of Emma Angeanette Martin. The decree was made without notice to the next of kin, on the allegation that the petitioner was the husband of the deceased. In this court the case was referred to a master, to hear the parties and their evidence, and to find the facts. On the coming in of his report the case was reserved for our determination.

The exceptions filed by both parties deal with the question whether Martin was the husband of the intestate. The master's report states: "That depends on:

"(a) Whether he already had a wife at the time he went through the ceremony of marriage with the deceased at Middletown, Rhode Island, on September 7, 1915; or

"(b) Whether, even if he were then unmarried, the intended marriage at Middletown was void by reason of irregularities connected with the ceremony, taken in connection with the possible non-consummation of the marriage."

The findings of the master answer the first question in the negative. Martin, under the name of Walter Winston Kenilworth, was a fortune teller; and in 1901, at Atlantic City he entered into illicit relations with a married woman named Sophia Boehm. For some years they lived together ostensibly as husband and wife, both before and after she had secured a divorce from her husband. But the master finds that, "contrary to the testimony of the Boehm woman, no ceremony of marriage ever took place between her and the appellee;" that, although they "were regarded and treated by their friends and relatives as man and wife," there was

no intent on the part of Martin to create the marriage relation between himself and her; and that "the appellee was never the husband of the Boehm woman." In the absence of the evidence we must accept these findings, and the parties do not argue to the contrary.

The main controversy arises as to the alleged marriage of Martin and Emma Angeanette Clark. In 1912 Mrs. Clark, who was a widow, sixty-three years old and possessed of a considerable fortune, went to the office of Martin (or Kenilworth) in Paris, to have her fortune told. He was thirty-seven years old. He paid her marked attentions, and she became infatuated with him. Before she sailed for the United States on July 1, 1913, an engagement of marriage had been made and broken more than once. In May, 1914, Mrs. Clark returned to Paris; but after the war broke out both decided to come to America until the end of the war, and they sailed for New York on the same boat in January, 1915. He resumed his occupation of fortune-telling at Atlantic City and later at Newport, Rhode Island. Mrs. Clark was often in his company and was importuned by Martin to marry him. On August 31, 1915, they went before the city clerk of Newport and applied for a marriage license. Across the end of the paper when issued was printed "This license may be used only in Newport, Rhode Island. F. N. Fullerton, City Clerk." Under this license a marriage ceremony took place on September 7, 1915, in Middletown, a town adjoining Newport; and it was performed by an Episcopal minister, who later filed the license with his return thereon at the office of the town clerk of Middletown. The bridal couple left Newport for New York on the evening boat, both occupying the same stateroom. After short stays at hotels in Atlantic City and New York as "Mr. and Mrs. W. W. Kenilworth, Paris and Newport," they rented a small apartment in New York and lived together (occupying always separate though connecting rooms) until January, 1916. From that time matters went ill with them, by reason of his irregular habits and vices; Martin resumed his life in Atlantic City, and Mrs. Martin remained in New York, except for about one month, until her death on June 12, 1917.

According to the master's report the statutory law of Rhode Island, in effect in 1915, relating to marriage of non-residents

(Pub. Laws, 1909, c. 430, § 10) is as follows: "Persons intending to be joined together in marriage in this State must first obtain a license from the clerk of the town or city in which they reside, . . . or, if not residents of this State, from the clerk of the town or city in which the marriage is to be solemnized. . . ." The license must bear upon it the words "This license may be used only in . . .;" and the town or city clerk is to insert the name of the town or city if the license is issued to persons non-resident in that State. The Gen. Laws of Rhode Island, 1909, c. 243, provide in § 22 (so far as here applicable) "No marriage solemnized before a person professing to have a license to join persons in marriage as required by this chapter, . . . shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected by want of jurisdiction or authority in such person or society nor by reason of non-compliance with any of the requirements of this chapter, if the marriage is in other respects lawful and has been performed with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

This § 22 has never been construed by the courts of Rhode Island. At the trial there was presented in addition to the statute itself the testimony of a member of the Rhode Island bar, who gave his opinion as to the correct construction of the statute. The master made certain findings on the assumption that he was bound by the testimony of this witness, because it was the only testimony submitted on the subject. Plainly that is not so. The evidence as to the law of Rhode Island consisted both of the statute and of the oral testimony of an expert. It was for the tribunal determining the facts to decide what the foreign law was, as in the case of any controverted fact depending upon like evidence. *Kline v. Baker*, 99 Mass. 253. The master had the right to disregard the testimony of the expert if that testimony did not commend itself to his judgment. *Lindenbaum v. New York, New Haven & Hartford Railroad*, 197 Mass. 314, 323. *C. W. Hunt Co. v. Boston Elevated Railway*, 199 Mass. 220, 235. He further reports: "If I am not bound by such evidence, and if it is within my province to weigh my own construction of the statute against the construction given it by the Rhode Island attorney, then I should make, instead of findings 43 and 44, the following findings:

"43 a. The marriage between the appellee and Mrs. Clark was irregular as a ceremonial marriage because the ceremony was not performed in the city in which the license was issued.

"44 a. Said irregular marriage, however, was saved as a valid marriage by the saving clause contained in section 22 of the Rhode Island statute set forth in finding 40."

In making these latter findings, as we construe the report, the master duly considered the expert's testimony but was not convinced by it, and formed his own opinion as to the legal effect of the statute. We think the master's construction of the statute was correct. See *Parton v. Hervey*, 1 Gray, 119; *Commonwealth v. Munson*, 127 Mass. 459; *Bradley v. Borden*, 223 Mass. 575, 586.

The master adds: "By finding 44 a I intend to decide only that, by the saving clause referred to, the ceremony had such effect as if solemnized in due form under a proper license, and I do not intend to decide whether, in view of the other facts found in this report, the parties were validly married." Apparently by "the other facts" he refers to finding 36: "The marriage between Mr. and Mrs. Martin, if there was a valid ceremonial marriage, was never consummated by coition;" and the further finding, that as a result of a fibroid tumor with which she was afflicted, it is doubtful whether coition was probable or physically possible. As to this it suffices to say that the consummation of a marriage by coition is not necessary to its validity. *Franklin v. Franklin*, 154 Mass. 515. See L. R. A. 1916 E 1274, note. And impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged. See R. L. c. 152, § 1; L. R. A. 1916.C 694, note. It is not contended that the marriage in question was induced by fraud on the part of Mrs. Martin. She "had explained to the appellee on more than one occasion that by reason of her condition it would be impossible for her to fulfil the part of a wife so far as the physical aspect of marriage was concerned;" and "the appellee had accepted her explanation, assigned it as an additional reason why she needed someone to care for her, and renewed his proposal of marriage." See *Millar v. Millar*, 175 Cal. 797; S. C. Ann. Cas. 1918 E 184 and note. It may be added that the present contention of the appellants, that the clergyman who performed the ceremony was not "a person professing to have a license to join persons in marriage"

manifestly was not advanced at the hearing before the master; and it is disposed of by the terms of the statute itself. The first exception of the appellants must be overruled. All other exceptions to the report are rendered immaterial or disposed of by what has been said above.

One of the objections of the appellants to the decree of the Probate Court is, that even if Martin was the lawful husband of the deceased, he "was an unfit and improper person to be appointed administrator of the estate." In addition to his general findings, the master has found specifically that Martin uses liquor to excess; that he has been convicted in New Jersey from time to time of the misdemeanor of fortune telling; that he knowingly gave false testimony at the hearings; that it would not be wise to give him possession of money and securities in which other persons have an interest; and that his feelings toward the appellants are hostile. Martin's place of residence at the time of the death of his wife has been found to be Paris, France; and apparently Paris was the domicil of Mrs. Martin, even before her marriage. The law of France as to who are entitled to share in the intestate's estate was not reported by the master. In addition to the possible interests of the next of kin, the claims of her creditors and of the State and federal governments for inheritance taxes must be considered in determining the suitability of Martin to administer the estate. On the peculiar and abnormal facts disclosed by this record it seems to us manifest that he is not a suitable person, and that the decree of the Probate Court appointing him administrator of the estate of his wife should be reversed. *Stearns v. Fiske*, 18 Pick. 24. *Thayer v. Homer*, 11 Met. 104, 110. See *Riddell v. Fuhrman*, *ante*, 69.

So ordered.

CHARLES E. OEHLERT vs. THERESA U. OEHLERT.

Worcester. June 23, 1919. — September 11, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Marriage and Divorce. Judgment.

Where a divorce *nisi* was granted during the great war to one born in Germany, who filed his petition to become a citizen of the United States before the declaration of Congress that a state of war existed between the Imperial German Government and the United States but was naturalized by a decree made after that declaration, and where his libel for divorce was filed after the decree admitting him to citizenship, it is not open to the libellee to contend that the decree of divorce is invalid by reason of the fact that the libellant was naturalized unlawfully on an application made during the existence of the war, because the decree admitting the libellant to citizenship is conclusive as to all matters necessarily before the court that made it and involved in the issue, and can be impeached or annulled only by a direct proceeding brought for that purpose.

LIBEL FOR DIVORCE, filed on November 22, 1917, charging adultery and praying for a divorce from the bond of matrimony and for the custody of a minor child about two years old.

The case was heard by *Wait, J.*, who granted a decree *nisi* to the libellant and awarded him the custody of the minor child, and further decreed that no alimony should be awarded to the libellee. The judge reported the case for determination by this court on the facts which are stated in the opinion. If the decree *nisi* was valid, it was to stand with the accompanying orders; if not, such order was to be made as justice required.

U. S. Rev. Sts. § 2171, begins as follows: "No alien who is a native citizen or subject, or a denizen of any country, State, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; . . ."

The case was submitted on briefs.

D. F. O'Connell, for the libellee.

G. S. Taft & W. E. Sibley, for the libellant.

DE COURCY, J. The trial judge granted a decree *nisi* to the libellant and reported the case to this court. It appears that Oehlert, who was born in Germany, declared his intention of

becoming a citizen of the United States on February 11, 1913, and filed his petition on March 20, 1917, but was not admitted to citizenship until November 14, 1917, or more than seven months after the declaration of Congress that a state of war existed between the Imperial German Government and the United States (April 6, 1917). See U. S. Rev. Sts. § 2171. The single question presented by the report is whether the decree is invalid by reason of the fact that the libellant was naturalized during the continuance of the war.

It is not necessary for us to consider whether the words "the time of his application" in said § 2171 (at which time an alien whose country is at war with the United States is excluded from citizenship) mean the time of filing the petition, or the time of the hearing in court. That question was not raised in the naturalization proceedings. See *United States v. Meyer*, 241 Fed. Rep. 305; *In re Duus*, 245 Fed. Rep. 813. It is not open to the libellee in the present suit. When this libel was filed in the Superior Court, November 22, 1917, the libellant had been admitted to citizenship. The order of the court so admitting him was a judgment of the same dignity as any other judgment of a court having jurisdiction. It is conclusive as to all matters necessarily before the court and involved in the issue and is not open to collateral attack. *Spratt v. Spratt*, 4 Pet. 393. *Scott v. Strobach*, 49 Ala. 477, 490. 2 C. J. 1124, and cases cited. It can be impeached or annulled only by a direct proceeding brought for that purpose; which now may be an independent suit under § 15 of U. S. St. 1906, c. 3592, 34 U. S. Sts. at Large, 601. *Johannessen v. United States*, 225 U. S. 227.

In accordance with the terms of the report, the decree *nisi* and the accompanying orders are to stand.

So ordered.

ISAAC SCHURMAN vs. IMPROVED PLASTIC-SLATE ROOFING COMPANY
& another.

Suffolk. June 23, 1919. — September 11, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Equity Jurisdiction, To reach and apply property fraudulently conveyed.
Corporation.

In a suit in equity under R. L. c. 159, § 3, cl. 8, by a judgment creditor of a corporation to reach and apply to the payment of the judgment debt property of the principal defendant fraudulently conveyed to a new corporation, it was found by the trial judge that the formation of the new corporation and the conveyance to it of practically all the assets of the principal defendant were for the fraudulent purpose and with the intent of preventing the plaintiff from collecting his judgment against the principal defendant, that both corporations shared in this fraudulent intent and that all the officers and stockholders of each were active in furthering it, and it was held that on the evidence the findings of the judge not only were warranted but required and that the plaintiff was entitled to a decree.

BILL IN EQUITY, filed in the Superior Court on December 13, 1917, under R. L. c. 159, § 3, cl. 8, by a judgment creditor of the defendant Improved Plastic-Slate Roofing Company, a corporation, to reach and apply to the payment of the judgment debt property of that defendant alleged to have been conveyed fraudulently to the defendant Browne-Mandile Company, alleged to have been formed for the purpose of receiving such property with the intent to prevent the plaintiff from obtaining satisfaction of his judgment.

The case was heard by Chase, J., the evidence being reported by a commissioner appointed under Equity Rule 35. The judge made the findings which are quoted in the opinion. By his order a final decree was entered granting the relief prayed for. The defendants appealed.

The case was submitted on briefs.

H. Bergson, for the defendants.

W. B. Grant & H. E. Whittemore, for the plaintiff.

PIERCE, J. The defendant Browne-Mandile Company admits that the plaintiff was the holder of an unsatisfied judgment against the defendant Improved Plastic-Slate Roofing Company when the

present suit in equity was brought, under R. L. c. 159, § 3, cl. 8, to reach and apply in payment of that judgment debt the assets of the Improved Plastic-Slate Roofing Company which the bill charges were fraudulently conveyed to the defendant Browne-Mandile Company with intent to delay, hinder and prevent the plaintiff from collecting his said debt against the Improved Plastic-Slate Roofing Company.

The evidence was taken by a commissioner at the hearing before a judge of the Superior Court, and is before this court on the defendants' appeal from the final decree of the Superior Court. From that evidence the following facts appear:

The Improved Plastic-Slate Roofing Company, when the principal debt above referred to was contracted, when its exceptions were overruled on May 25, 1917 (227 Mass. 129), and when the action went to final judgment in the Superior Court on July 30, 1917, was owned by John and Antonio Mandile. These persons held all the shares of stock of the company with the exception of a single share placed by them in the name of the bookkeeper and stenographer of the corporation for voting purposes only. John Mandile, the principal owner of the stock, resigned the offices of president, of treasurer, and of director on June 8, 1917. On June 8, 1917, the stockholders of the debtor corporation voted to liquidate its assets. On the same day, Antonio Mandile and the bookkeeper, the remaining stockholder John Mandile being present, held a directors' meeting at which the resignation of John Mandile as president, treasurer and director was accepted and Antonio Mandile was elected president and treasurer to fill those vacancies. The newly elected treasurer then "reported the affairs of the company were such that the company could not continue in business. Thereupon it was voted, that the treasurer liquidate the business as much as possible of the outstanding indebtedness. Voted that the treasurer be and hereby is authorized to sell and convey any and all of the assets of the company for cash for the best price obtainable." On the same day, June 8, 1917, the assets of the company with the exception of bills receivable, by a comprehensive and extended bill of sale were sold to Charles V. Browne, an employee of the corporation, for the sum of \$650, which sum Browne drew from the office of the company as a part payment of certain unpaid commissions claimed to be due him. Meanwhile, Browne,

hearing John Mandile say "Well, I'm done, I am going to get out of the business," and "Well, it's on the bum; we lost the Schurman case and I am going to get out," had suggested to John Mandile to start a new company to be known as the Browne-Mandile Company, and the necessary preliminary steps thereto had been taken. The first meeting for organization of the new corporation was held on June 8, 1917. John Mandile was elected the president and treasurer and a director. As in the old corporation he held a majority of stock, the other incorporators being the stenographer and a brother of the corporation's attorney, whose one share each belonged to John Mandile. At the stockholders' meeting the clerk read the following offer from Browne to sell and transfer the property which he had that day acquired:

"I hereby offer to sell to your company furnishings equipment and material which you can use in your business as shown in the schedule annexed, and also will assign to you all my right, title and interest in two unfinished contracts which I have purchased from the Improved Plastic-Slate Roofing Company, and all my right, title and interest in and to other contracts originally made by the Improved Plastic-Slate Roofing Company, with various people, all for the sum of \$2,200, to be paid for in stock of your company, which stock is to be issued to me or my nominees. If you accept such offer, I hereby consent to the use of my name as part of your corporate name."

The stockholders of the new company thereupon "voted to accept this offer, and that the officers be authorized to issue stock upon receiving the proper bill of sale." Browne, on the back of his bill of sale, transferred by a sealed instrument "all the within described property," which was all the assets of the Improved Plastic-Slate Roofing Company with the exception of its accounts receivable. Browne never was an officer of the new company, held no stock therein, and was repaid the consideration for the bill of sale \$650. The evidence showed there was no change in the conduct of the business when or after the new company was organized.

The old company had purchased on January 15, 1917, an automobile truck under a lease, for the full value of \$2,785, paying in cash \$235, turning in an old truck for \$750, and the balance, \$1,800, in twelve notes of \$150 each payable monthly. Up to May 15, 1917, the notes had been regularly paid, making a total payment of

\$1,585. The old company, after the rescript from this court, permitted the note due June 15, 1917, to go to protest, and then drove the car to the lessor company's shop and surrendered it under the terms of the lease. Browne and John Mandile arranged with the agent of that company "to again sell that particular truck to the Browne-Mandile Company for the amount that might be still unpaid under the old agreement." The owners of the truck sold it at auction to themselves, and then made a new lease to the Browne-Mandile Company for the balance unpaid by the Improved Plastic-Slate Roofing Company.

Upon the evidence the trial judge of the Superior Court certified in a memorandum of facts found, that "The formation of the Browne-Mandile Company and the subsequent conveyance to it of practically all the assets of the Improved Plastic-Slate Roofing Company was for the fraudulent purpose and with the intent of delaying, hindering and preventing the plaintiff from collecting his judgment against the latter company. Both corporations shared in this fraudulent intent, and all the officers and stockholders of each were active in furthering it," and ordered accordingly the decree appealed from. We think the conclusions of fact found by the presiding judge were not only warranted but required, whether the evidence be measured by standards of legal fraud or tested in the crucible of moral obligation.

The decree was right and is to be affirmed with double costs.

Decree accordingly.

EDWARD F. BROWN & another vs. BOSTON AND MAINE
RAILROAD & others.

Suffolk. July 29, 1919. — September 11, 1919.

Present: RUGG, C. J., CROSBY, PIERCE, & CARROLL, JJ.

Public Service Commission. Boston and Maine Railroad. Practice, Civil, Brief before full court. Corporation, Ultra vires. Constitutional Law.

The jurisdiction given to the Supreme Judicial Court by St. 1913, c. 784, § 27, in equity to review, annul, modify or amend any rulings or orders of the public service commission extends to an order made by that commission in regard to

the consolidation of the railroad companies constituting the Boston and Maine Railroad system and the reorganization of that system under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323.

Where the plaintiffs in their brief in a suit in equity to review an order of the public service commission in regard to a consolidation of railroad companies and the reorganization of a railroad system declined to discuss the validity of an "alleged debt" of \$13,306,000, which was to be paid under the plan of reorganization, further than to restate their previous contentions, and the record disclosed evidence sufficient to determine the validity of this indebtedness, it was *held* that this equivocal position of the plaintiffs was not to be treated as an admission or a waiver, and the court proceeded to decide the question.

On a bill in equity under St. 1913, c. 784, § 27, by minority stockholders of the Boston and Maine Railroad to review an order of the public service commission approving the agreement for the consolidation of the Boston and Maine Railroad system and the plan for the reorganization of that system, it appeared that the notes constituting the unfunded debt of the Boston and Maine Railroad outstanding on March 31, 1915, to be paid or funded under the provisions of Spec. St. 1915, c. 380, § 7, amounting to \$13,306,000, all were authorized by votes of the directors, that all were sold for cash, that the proceeds all went into the treasury of the company and that no valid defence to any of the notes was shown, and it was *held* that the debt was a valid one.

In St. 1898, c. 194, authorizing the Boston and Maine Railroad to purchase the shares of any railroad corporation whose road is leased to or operated by it, or of which it owns a majority of the capital stock, the means provided in § 2 of that statute for purchasing such shares by the issuing and sale of its own capital stock is not exclusive of other methods of purchase, and the money for the purchase may be provided by the sale of notes of the company.

Even assuming that the purchase by the Boston and Maine Railroad of shares in its leased and subsidiary lines by means of the sale of notes was *ultra vires*, it could be and was ratified by subsequent legislation.

Sections 2 and 6 of Spec. St. 1915, c. 380, giving the public service commission authority to approve certain acts of the Boston and Maine Railroad after notice and hearing, lawfully confer upon the commission administrative powers and *quasi* judicial functions.

The provisions of Spec. St. 1915, c. 380, deal with a situation peculiar to the Boston and Maine Railroad and its leased lines, no other railroad corporation being similarly situated, and in no way violate the constitutional provisions requiring equal laws.

The approval, in the order of the public service commission above referred to, of the issue by the Boston and Maine Railroad, upon vote of two thirds in interest of the common stock of that corporation, at any time before January 1, 1924, of one hundred and twenty thousand shares of first preferred stock at the par value of \$12,000,000 for the purpose of paying an equal amount at par of bonds issued under the reorganization plan for the payment of the floating indebtedness, was *held* to be valid under the circumstances shown.

In the case above described it appeared that a majority of the stock of the Boston and Maine Railroad was held and voted on at the stockholders' meeting, at which the consolidation agreement and reorganization plan were approved, by the Boston Railroad Holding Company, and that the decree of a federal court by which the trustees of the stock of the holding company were appointed authorized them to aid in facilitating a reorganization of the Boston and Maine Rail-

road, and it was *held* that the directors of the holding company were authorized to vote on the stock.

In the same case it was *held* that the delegation by the directors of the holding company of the casting of the vote to two of their number was proper, voting by proxy being authorized by St. 1906, c. 463, Part II, § 37.

In the same case it was *held* that, the Boston and Maine Railroad being a Massachusetts corporation, voting by proxy at a meeting of its stockholders held here in accordance with Massachusetts laws was binding upon the corporation, even if it should be assumed that the law of New Hampshire, under the laws of which State the Boston and Maine Railroad also was incorporated, did not allow voting by proxy.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 1, 1919, by two minority stockholders of the Boston and Maine Railroad under St. 1913, c. 784, § 27, to review, annul, modify or amend an order of the public service commission of March 25, 1919, approving an agreement dated November 26, 1918, for the consolidation of the railroad companies constituting the Boston and Maine Railroad system and a plan for the reorganization of that system under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323.

The case was heard by *Braley, J.*, who made a final decree that the bill be dismissed. The plaintiffs appealed.

The decree appointing the trustees of the stock of the Boston Railroad Holding Company, referred to in the opinion, was made by the District Court of the United States for the Southern District of New York on October 17, 1914.

C. W. Crooker, (*E. F. Dwelley* with him,) for the plaintiffs.

G. L. Mayberry, (*L. R. Chamberlain* with him,) for the defendant railroad corporations.

B. E. Eames & W. C. Rice, representing certain holders of notes of the Boston and Maine Railroad, were given leave to file a brief as *amici curiae*.

RUGG, C. J. This is a bill in equity by two owners of stock, one of fifty-five shares and the other of fifty-two shares, in the Boston and Maine Railroad; under St. 1913, c. 784, § 27, "to review, annul, modify or amend" an order of the public service commission. That order was made pursuant to particular authority assumed to have been conferred by Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323, hereafter termed the special act. Eight railroads are joined with the members of the public service commission as defendants. The special act provided for

a reorganization of the Boston and Maine Railroad and a consolidation by it with its numerous subsidiary and leased railroads. In assumed pursuance of the special act, the presidents and a majority of the directors of each of the defendant railroads, acting for the respective railroads but subject to the consent of the stockholders of the several railroad corporations and to the approval of public authorities of the different States having jurisdiction, entered into an agreement for consolidation of the several railroads into a single corporation. Votes of the stockholders of the several corporations were passed purporting to approve the agreement of consolidation by large majorities. The several corporations then petitioned the public service commission to issue orders and certificates necessary to enable them to carry into effect the agreement for consolidation. Hearings were had and thereafter the public service commission made a report of its findings of fact and issued orders and certificates approving the agreement for consolidation and enabling it to be consummated substantially in accordance with the prayers of the petition.

1. The defendants question the jurisdiction of this court to consider the bill on the ground that the provisions of St. 1913, c. 784, § 27, authorizing proceedings in general for the correction of errors of law in any ruling or decision of the public service commission, are not applicable under the special act. The revision by this court of the orders and rulings of the public service commission, provided for by § 27, relates only to such as are unlawful and then "to the extent only of such unlawfulness." A careful study of the special act reveals no provision which either expressly or by fair implication exempts the public service commission in the performance of the duties thereby imposed upon it from the supervisory control of the court established by § 27. It is not consonant with the main design of the general law or of the special act that unlawful acts committed by the public service commission in respect of this consolidation should go unredressed by the speedy and direct method ordinarily applicable to its rulings and orders.

2. It is provided by § 7 of the special act that "The Boston and Maine Railroad may issue stocks, common or preferred, or bonds, or both stock and bonds, subject to the provisions of section fifteen of chapter seven hundred and eighty-four of the

acts of the year nineteen hundred and thirteen, and of any acts in addition thereto or in amendment thereof, for the purpose of paying or funding its unfunded debt outstanding on the thirty-first day of March in the year nineteen hundred and fifteen, and any debt of any of its subsidiary companies outstanding on such date which it may lawfully assume under the provisions of this act in connection with the purchase of the properties and franchises of or consolidation with such subsidiary companies, which debts, for the purpose of such finding, shall be deemed to be debts properly incurred for lawful purposes under the statutes of this Commonwealth." In § 4, after authorization of the issue of new stock of the reorganized corporation, there is a somewhat similar provision to the effect that "The proceeds of such stock so issued may be applied to the payment of the unfunded debt of the corporation outstanding on the thirty-first day of March in the year nineteen hundred and fifteen, including any indebtedness of any subsidiary company outstanding on said date which said corporation may lawfully assume under the provisions of this act, which debts for the purpose of such payment shall be deemed to be debts properly incurred for lawful purposes under the statutes of this Commonwealth." It appears from the record that these provisions of the special act refer to and include an indebtedness of the Boston and Maine Railroad amounting to \$13,306,000 and to indebtedness of subsidiary companies aggregating several millions of dollars.

3. The plaintiffs now, according to their brief, after reciting several reasons leading them to adopt that course, state that they "do not desire to urge their contentions with respect to this alleged debt" upon this court in these proceedings, that is, "whether or not the \$13,306,000 of alleged debt of the defendant Boston and Maine Railroad was, at the date of the order of the Commission, the lawful valid debt of that corporation, . . . further than to plainly restate them in this brief." Their reasons for the position now taken are of no consequence. It is only important to understand and deal with their present contentions. If this statement quoted from their brief be treated as a waiver of all contention that the debt of \$13,306,000 is void and a concession that for the purposes of this case it is to be treated as valid and binding upon the Boston and Maine Railroad, then the main

ground upon which to rest an argument as to the unconstitutionality of the statute has slipped away so far as concerns this debt.

If it be conceded that the debt of \$13,306,000 of the Boston and Maine Railroad which is to be refunded is valid, nothing remains to the plaintiffs worthy to be dignified as a constitutional question concerning deprivation of property without due process of law or denial of equal protection of the laws. It needs no discussion to prove the power of the Legislature to authorize a public service corporation in such financial straits as the Boston and Maine Railroad has been, acting through a majority vote of its stockholders, to refund its valid indebtedness in the manner authorized by the special act against the protest of minority stockholders so far as relates to deprivation of their property without due process of law or denial to them of the equal protection of the laws.

It is not clear, however, that the plaintiffs intend to make such a sweeping admission. A mere declination to discuss the validity of the indebtedness, without admission of its validity for the purposes of this case, cannot compel the court to rest its decision upon constitutional grounds based upon assumption of the invalidity of the debt, when the record discloses enough to determine its validity for the purposes of this proceeding. A statement of desire not to argue propositions "further than to plainly restate them" may be regarded as not a satisfactory waiver and not intended as such. A complete and plain statement of a contention often is a cogent argument in its support.

If there were ground for the contention that the order of the public service commission authorized the inclusion of so large a sum as \$13,306,000 unlawfully in the capitalization of a public service corporation, we should hesitate long before passing it over in a proceeding like the present even upon waiver of the point by a party. It would be a gross perversion of the idea of public supervision of capitalization of corporations to permit such an over-capitalization, or capitalization of illegal claims in the nature of debts upon which rates must be permitted to enable a fair return as upon capital honestly invested.

The position of the plaintiffs upon this point seems equivocal. The point itself is of importance. Since it has been raised upon the record and has not been clearly waived, it will be considered under these circumstances. It hardly needs to be said

that the rights of persons in interest not parties hereto cannot be precluded.

4. The finding of the public service commission was that there were outstanding notes of the Boston and Maine Railroad to the amount of \$13,306,000, and that this fact was not disputed. The record confirms the truth of this finding. The commission permitted the counsel for the plaintiffs to introduce any competent evidence of any facts which tended to show that any of the notes were not enforceable obligations of the Boston and Maine Railroad. The commission found, however, that in every instance the issue of the notes was authorized by vote of the directors, that the notes were all sold for cash, that the proceeds all went into the treasury of the company and that no valid defence to any of the notes was disclosed. Assuming that a considerable portion of these proceeds afterwards was used to purchase stock of the Worcester, Nashua and Rochester Railroad Company and the Maine Central Railroad Company, the commission further found that there was nothing in such use which affected the liability of the Boston and Maine Railroad on the notes.

The alleged right of the Boston and Maine Railroad to purchase the stock of other railroads rests upon St. 1898, c. 194, § 1, which authorized it, subject to approval of the board of railroad commissioners, to "purchase and hold the shares of the capital stock, or any part thereof, of any railroad corporation whose road is leased to or operated by it, or of which it owns a majority of the capital stock." It appears upon the record to have been conceded that the railroad corporations whose stock was purchased came within this description, and that § 2 of that act authorized the issuance and sale of stock of the Boston and Maine Railroad for the purpose of providing means for the purchase of such shares. At all events, no question was raised touching these points. Section 2 contains no language to the effect that the exclusive method of providing such means is therein set forth. The fair construction of that act as a whole is that § 2 is not a limitation but confers a particular means in addition to those which might otherwise be open to the Boston and Maine Railroad as a corporation acting under § 1. If it had been the purpose of the Legislature to confine the Boston and Maine Railroad to the single method specially provided by § 2, restrictive language to that

end would naturally have been used. This construction is confirmed by practical considerations which need not be detailed at length and by reference to St. 1891, c. 308, which under restrictions authorized the acquisition by the Boston and Maine Railroad of the franchises and property of its lessee and subsidiary companies and recognized as valid its ownership of the capital stock of some of them. See, for example, Sts. 1888, c. 250; 1890, c. 185.

Unless restricted by some provision of law, a railroad corporation has authority to incur debts for lawful purposes. To that end it may borrow money and give its notes therefor. *Commonwealth v. Smith*, 10 Allen, 448, 455. *Railroad Co. v. Howard*, 7 Wall. 392, 412, 413. See R. L. c. 109, § 24; Sts. 1906, c. 463, Part II, § 48; 1912, c. 725, Part II, § 5.

The result is that the debts of the Boston and Maine Railroad, amounting to \$13,306,000, so far as concerns the special act and the authority of the public service commission thereunder, were valid. From this the conclusion is irresistible and indubitable that no question as to the constitutionality of the special act is reached or can arise founded upon any contention that the unfunded debt of \$13,306,000 of the Boston and Maine Railroad is illegal. This decision rests upon this ground.

5. The same result would be reached upon another and independent ground. Even if it were assumed (contrary to what the record shows), that the \$13,306,000 was a debt incurred by the Boston and Maine Railroad for the purchase of stock in its leased or subsidiary lines without express or implied authority of law, the same conclusion would follow. It is plain on this record that this indebtedness was incurred for the purchase of such stocks. Upon the hypothesis that borrowing of money for that purpose was not within the purview of St. 1898, c. 194, it is manifest that a debt thus incurred would be merely *ultra vires*. There is nothing inherently evil or malefic or contrary to public policy in such purchase. It is forbidden by St. 1906, c. 463, Part II, § 57, "unless authorized by the General Court or by the provisions" of general law. The incurrence of a debt in order to procure funds to make such purchase might originally have been authorized by the Legislature. There is no constitutional objection to subsequent legislation confirming, ratifying and rendering legal and

enforceable such debts although *ultra vires* at the time they were incurred. Such subsequent validation no more interferes with the vested constitutional rights of the stockholders than does a statute confirming the sale of a corporate franchise or the execution of a mortgage originally not authorized by law. *Shaw v. Norfolk County Railroad*, 5 Gray, 162, 180. *Graham v. Boston, Hartford & Erie Railroad*, 118 U. S. 161, 168-172.

There is no substance in the contention that a subsequent statute ratifying and confirming a debt of a corporation, incurred on sufficient consideration but *ultra vires*, is the taking of property rights of the stockholder without due process of law. Statutes validating contracts void or non-enforceable in their inception have been upheld in numerous instances on the ground that they effectuate the intent of the parties and prevent one from escaping payment for property which he has received. *Hanscom v. Malden & Melrose Gas Light Co.* 220 Mass. 1, and cases collected at page 8. *Utter v. Franklin*, 172 U. S. 416. *Gross v. United States Mortgage Co.* 108 U. S. 477. *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 425, 426. *Anderson v. Santa Anna*, 116 U. S. 356, 363, 364. *Ritchie v. Franklin County*, 22 Wall. 67. *Grenada County Supervisors v. Brogden*, 112 U. S. 261, 270, 272. *Randall v. Kreiger*, 23 Wall. 137, 149. *Watson v. Mercer*, 8 Pet. 88.

6. This principle and these decisions effectually dispose also of the contention that it is the exercise of a judicial function by the Legislature to ratify and confirm and authorize the corporation to treat as legal its *ultra vires* debts. *Wildes v. Vanvoorhis*, 15 Gray, 139. See *In re Mayor & Aldermen of Northampton*, 158 Mass. 299.

7. There is nothing in the suggestion that § 7 of the special act confers upon the public service commission power to decide a controversy concerning property without trial by jury.

8. There is no vested right in stockholders to subscribe for this issue of new stock. *Attorney General v. Boston & Maine Railroad*, 109 Mass. 99. See *Gray v. Portland Bank*, 3 Mass. 364. The issue of new stock may be upon such terms as is voted by the stockholders within the scope of legislative sanction. *Hale v. Cheshire Railroad*, 161 Mass. 443.

9. There is no delegation of legislative power to the public service commission in §§ 2 or 6. These sections confer only administrative powers upon that commission and certain quasi

judicial functions. They are of a kind which have been exercised in this Commonwealth by this and other commissions of a kindred character for many years. They have been recognized too long as not violative of any constitutional provision now to be open to question. No authorities are cited by the plaintiffs in support of this contention and we believe none can be found. That these sections violate no provision of the Constitution is within the principle of many decisions. *Mayor & Aldermen of Worcester v. Norwich & Worcester Railroad*, 109 Mass. 103. See *Selectmen of Norwood v. New York & New England Railroad*, 161 Mass. 259; *Providence & Worcester Railroad v. Norwich & Worcester Railroad*, 138 Mass. 277; *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556; *Commonwealth v. Hyde*, 230 Mass. 6; *Boston, petitioner*, 221 Mass. 468; *Childs v. Krey*, 199 Mass. 352; *Weston v. Railroad Commissioners*, 205 Mass. 94; *Holcombe v. Creamer*, 231 Mass. 99, 111.

10. There is no foundation for an argument that the special act violates the constitutional provision requiring equal laws. This case presents a situation peculiar to the Boston and Maine Railroad and its leased lines. Special legislation was wholly appropriate under these circumstances. No other railroad corporation is similarly situated. For many years all legislation respecting railroads was by special act. Because certain general laws have been passed is no reason why in appropriate instances special acts may not still be enacted.

11. Manifestly it is lawful for the Legislature to provide in enacting a general plan for the consolidation of several railroads that an existing corporation, in this case the Boston and Maine Railroad, to which the others become joined, shall assume and pay or provide for the payment or refunding as its own of debts of other subsidiary companies as part consideration for the purchase of their property and franchises which otherwise under existing law it would be unlawful for the Boston and Maine Railroad to pay or to refund. There has been no serious question on this record concerning the validity of the debts of the several subsidiary railroad corporations, as against the original debtors, which under the special act may be and under the order of the public service commission are to be refunded by the Boston and Maine Railroad as reorganized.

12. The order of the public service commission approved the issue, upon vote of two thirds in interest of the common stock of the Boston and Maine Railroad at any time before January 1, 1924, of one hundred and twenty thousand shares of first preferred stock at a par of \$12,000,000 for the purpose of paying an equal amount at par of bonds issued under the plan. This order was valid under the circumstances. The option to issue this stock rests with the majority vote of the common stockholders. It is not a right to demand stock vested in the bondholders. Section 7 of the special act expressly authorizes the issue of such stock, to pay its unfunded debt, without limit as to time. The present order and plan authorize issuance of the stock to pay bonds by which in the first instance the floating indebtedness is to be paid. There is nothing in *Bulkeley v. New York, New Haven, & Hartford Railroad*, 216 Mass. 432, at all at variance with this conclusion. In that case the general law was considered, while the case at bar rests upon a special act passed for the avowed purpose of establishing different rules to meet an extraordinary situation. In that case the option to demand stock rested with bondholders, whose interest inevitably would be to exercise their option only in the event that they could get stock of a railroad corporation by paying less than its real value and thus unduly increase capitalization. In the case at bar the option rests with those whose interest will lead them to get full value for the stock and not to increase the capitalization beyond that for which the corporation receives full return. The time within which the right may be exercised is not under these circumstances unreasonably long. The facts in that case were radically different from those in the case at bar.

13. There is nothing on this record to show that the meetings of the stockholders of the several corporations, at which the votes were passed approving the terms of the consolidation agreement, were not legally called and held. The finding of the public service commission is explicit. The burden is upon the plaintiffs to show that this finding is invalid. We find nothing on the record to support a reversal of this finding as illegal.

14. There is no invalidity disclosed on this record respecting the voting of the stock in the Boston and Maine Railroad held by the Boston Railroad Holding Company. The latter company

held a majority of the stock of the former corporation. No legal meeting of its stockholders could be held without this stock. St. 1906, c. 463, Part II, § 33. The decree of the federal court appointing trustees of the stock of the Boston Railroad Holding Company among other matters directed them to "exercise all the powers which owners of shares of the holding company are entitled to exercise, except the right to sell or otherwise dispose of them," to act in the election of directors in any corporation which it controls so as to assure efficient management in the interest of that corporation and to aid in facilitating a reorganization of the Boston and Maine Railroad. These powers involved a voting of the stock in order to effectuate the manifest design of the decree. The delegation by the directors of the holding company of two of their number to vote its stock in the Boston and Maine Railroad was proper. Voting by proxy was authorized. St. 1906, c. 463, Part II, § 37.

15. The Boston and Maine Railroad being a Massachusetts corporation, voting by proxy at a meeting of its stockholders held here in accordance with Massachusetts law was binding upon the corporation. Even if it be assumed that the law of New Hampshire, within which State the Boston and Maine Railroad also was incorporated, was different in respect of permitting voting by proxy at the meeting of the stockholders, a fact not clearly apparent upon this record, the stockholders' meeting held in Massachusetts and conducted according to its law was lawful. The meeting need not be repeated in New Hampshire, even if it be assumed that the law of that State was different in this particular and did not allow voting by proxy. *Graham v. Boston, Hartford & Erie Railroad*, 118 U. S. 161, 168, 169. *Attorney General v. New York, New Haven, & Hartford Railroad*, 198 Mass. 413, 420, 422.

16. For the same reasons the meetings of the other corporations chartered under Massachusetts laws and under the laws of other States were valid and binding because held here and in accordance with our laws.

All the questions argued by the plaintiffs have been considered. No further discussion is required. There is no merit in any of the plaintiffs' contentions.

Bill dismissed with costs.

MAURICE F. REIDY & others vs. FREDERICK J. KENNEDY.

Worcester. January 14, 1919. — September 12, 1919.

Present: RUGG, C. J., LORING, BRALEY, CROSBY, & CARROLL, JJ.

Res Judicata. Landlord and Tenant. Evidence, Competency.

At a second trial, after the sustaining of exceptions, of an action for rent alleged to be due under a lease in writing, where the defence alleged is an eviction of the defendant by the lessor and a surrender of the lease to the lessor by the defendant, evidence offered by the defendant to prove such eviction and surrender by the same facts that were in evidence at the former trial, on which the trial judge had found that there was no eviction and that the lessor had not accepted a surrender of the lease, is not to be excluded as *res judicata*, no final judgment having been entered.

At the trial of an action for rent alleged to be due under a lease in writing, where the defence was an alleged eviction of the defendant by the lessor and a surrender of the lease to the lessor by the defendant, evidence was offered and was excluded by the judge, that the defendant had ceased to occupy the leased premises, that the plaintiff's agent made an agreement in writing with a third person to give him a lease of the premises conditional upon the forming of a trust company, that, after the making of such agreement, the plaintiff's agent told the defendant's agent that he, the plaintiff's agent, had signed an agreement for a lease, and that the plaintiff's agent when the defendant's agent said to him, "Then I am all through with the store and we have nothing more to do with it," replied, "You are all through with the store and have nothing more to worry about," that the store was occupied for a number of months by one representing the prospective tenant under the agreement and that at the request of such prospective tenant the defendant's agent delivered the keys of the premises to this occupant, that the rent paid by such occupant, until he vacated the premises, was paid over to and received by the plaintiff, and that no demand was made on the defendant for rent until after the application of the trust company for a charter was denied. There was other evidence offered and excluded tending to show a surrender of the lease and an eviction. *Held*, that the exclusion of the evidence was erroneous.

The owners of a business building sold and conveyed the building and thereby assigned to the grantee an outstanding lease of a store in the building. The grantee leased the whole building to a new tenant for a long term, subject to the outstanding lease which he assigned to the new lessee. The lessee under the old lease paid no rent after that time. By agreement of the parties the grantors paid to the grantee the full amount of the rent under the old lease up to the time of its termination and the grantee paid this amount to his new lessee. *Held*, that the present lessee could maintain an action on the old lease against the lessee thereunder for the rent that had accrued after the lease and assignment to him, for the benefit of the grantors of the building, the lessors under the lease sued upon.

In the action above referred to, a letter of one of the original lessors written after the sale and conveyance of the property, when he no longer was one of the owners, was *held* not to be competent evidence.

In the same case evidence of a payment of rent by a former occupant of the store to a representative of the former owners, which was not in payment of rent that accrued after the lease and assignment, was *held* not to be admissible.

In the same case it was *held* that evidence that no attempt was made by the former owners to collect rent from the defendant after a certain date was admissible as bearing upon the question of the surrender of the lease by the defendant to the original lessors.

In the same case it was *held* that certain evidence, which was not admissible to prove the surrender of the lease, was admissible for another purpose for which it was offered.

CONTRACT on an account annexed under St. 1915, c. 146, § 2, for rent of a store at 412 Main Street in Worcester alleged to be due under the terms of a lease in writing dated November 17, 1908, for four months, payable in advance on the first days of the months of October, November and December, 1915, and January, 1916. Writ dated January 7, 1916.

The answer, among other defences, alleged that the plaintiffs evicted the defendant from the leased premises and that the plaintiffs accepted from the defendant a surrender of his lease.

In the Superior Court the case first was tried before *Sander-son*, J., without a jury. He made a general finding for the plaintiffs and assessed damages in the sum of \$2,544. The defendant alleged exceptions, which were sustained by this court in a decision reported in 228 Mass. 390.

After the rescript the plaintiffs filed a motion to amend the writ by inserting, instead of the original plaintiffs, Maurice F. Reidy, Frank A. Drury and Thomas E. O'Connell, all of the city and county of Worcester, the action being brought in the interest and for the benefit of the original plaintiffs. The motion was allowed "upon the express condition that the defendant shall be entitled to all the rights (including trial by jury) to which he would be entitled if a new action had been brought against him."

The defendant filed an amended answer and claimed a trial by jury. The case was tried before *Raymond*, J. By agreement of counsel the case was tried as if the writ was dated March 2, 1916, and as if the declaration included an item of \$500 for rent claimed to be due on February 1, 1916. The jury found for the

plaintiffs in the sum of \$2,720.80, including interest from March 2, 1916. The defendant alleged exceptions, raising the points which are stated in the opinion.

The case was submitted on briefs.

E. H. Vaughan, E. T. Esty & J. Clark, Jr., for the defendant.

G. S. Taft, for the plaintiffs.

CARROLL, J. This is an action to recover rent alleged to be due under a written lease. The case was first tried in the jury waived session of the Superior Court, where it was found that the plaintiffs were the heirs at law, and executors of and trustees under the will of Ransom C. Taylor, deceased, who executed a written lease of the premises 412 Main Street, Worcester, to the defendant, to commence March 1, 1909, and expire on February 29, 1916; that the rent was \$6,000 a year, payable in advance in monthly instalments of \$500 on the first day of each month; and that the plaintiffs sought to recover the rent due under the lease from October 1, 1915, to the end of the term.

It was further found that on March 18, 1909, the defendant assigned the lease to the Kenney-Kennedy Company, with the assent of the lessors without waiving the covenants in the lease, and thereafter Frank J. Kenney acted for the defendant and Frank W. Butler for the plaintiffs in all matters connected therewith; that the Kenney-Kennedy Company ceased to occupy the store in August, 1913, when it was sublet, the Kenney-Kennedy Company paying the rent to the plaintiffs until February, 1915; that from August, 1913, until the end of the term, Kennedy and the assignee were willing to be relieved of liability under the lease; that in February, 1915, William H. Minton, who was endeavoring to obtain a charter for a trust company to be located in Worcester, talked with the defendant and Kenney and with Forrest W. Taylor, one of the original plaintiffs, respecting the leased premises as a suitable location for the trust company, and Taylor said he would not release the defendant; that after this interview, on February 23, 1915, when Taylor was away from Worcester, Butler made a written agreement with Minton to lease the store 412 Main Street, Worcester, for the term of seven years from March 1, 1915, but stated to Minton that the agreement was subject to the existing lease to Kennedy, and if this lease was not surrendered the writing would not be effective. It was understood that the lease referred

to in the written agreement was not to be executed unless the trust company obtained a charter.

It was also found that when this agreement dated February 23, 1915, was signed, Butler informed Kenney that Minton had agreed to take care of the rent of the premises while the application for the trust company's charter was pending, and if the trust company were formed it would pay the rents thereafter; that Minton paid the lessors \$500 for the rent due March 1, 1915, and let the premises to one Campbell at a rent of \$50 a week which was later advanced to \$75; that Kenney, acting for Minton, collected the rent from Campbell for seven weeks; that the key of the premises was delivered to Campbell by Kenney and the rent received from Campbell was paid the lessors by Alonzo G. Davis, who was interested with Minton in the organization of the proposed trust company; that, after seven weeks, Davis collected the rents from Campbell until Campbell vacated the store in December, 1915, and paid them to the lessors; that in June or July, 1915, the charter for the proposed trust company was denied; that Minton then requested Campbell to pay the rent to Kenney, but Kenney refused to accept it and Davis continued to collect it from Campbell until the end of his tenancy; and that during this time Campbell was ordered by Davis, at the request of Taylor, to remove from the premises a sign advertising a bankrupt stock of goods.

Further, that on August 18, 1915, the original plaintiffs conveyed the real estate of which the leased premises were a part to Charles M. Thayer, trustee, subject to the Kennedy lease; that it was orally agreed by them that the plaintiffs should collect the rents during the remainder of the term and pay them to Thayer, and these rents at the rate of \$500 a month were paid by the plaintiffs to Thayer to March 1, 1916; that on October 1, 1915, Thayer leased the entire premises to Maurice F. Reidy, Frank A. Drury and Thomas E. O'Connell (the present plaintiffs), subject to the defendant's lease, for the term of sixteen years; that when the lease to Reidy and his associates was executed Thayer agreed with them to collect the rent from his grantors and pay it to Reidy and his associates, and the rent was paid them for the five months from October 1, 1915, to March 1, 1916. It was found that there was no surrender of the Kennedy lease to the

plaintiffs, and no eviction by them. The judge found for the plaintiffs and assessed damages in the sum of \$2,544.

The case came to this court on the defendant's exceptions, which were sustained. *Taylor v. Kennedy*, 228 Mass. 390. The plaintiffs then filed a motion in the Superior Court to amend the writ by substituting as plaintiffs in the place of Forrest W. Taylor and others, "Maurice F. Reidy, Frank A. Drury and Thomas E. O'Connell, . . . this action being brought in the interest and for the benefit of Forrest W. Taylor *et als*, the plaintiffs originally named in the writ." The motion to amend was allowed upon condition that the defendant "shall be entitled to all the rights (including trial by jury) to which he would be entitled if a new action had been brought against him." The defendant filed an amended answer and at the second trial in the Superior Court the jury found for the plaintiffs. The case is before us on the defendant's exceptions.

The defendant offered evidence tending to show an eviction by the original plaintiffs and a surrender of the lease to them by the defendant; and offered to prove this eviction and surrender by the same facts that were in evidence at the former trial. The offer of proof was excluded on the ground that the eviction and surrender were *res judicata*, to which ruling the defendant excepted.

At the second trial the parties were not the same as at the former trial. At the second trial Reidy and his associates were then the plaintiffs, although prosecuting the action for the benefit of the original plaintiffs, and under the order of the judge of the Superior Court the amendment changing the parties plaintiff was allowed on condition that the defendant be entitled to the same rights to which he would be entitled if a new action had been brought. Although in this court the defendant's exceptions taken at a former trial were sustained, no restrictive order was made limiting the scope of the new trial and no judgment was entered in the case. The plaintiffs cannot invoke the principle of *res judicata* to prevent the defendant from showing by material evidence that the lease was surrendered to the lessors, or that he was evicted. It is only when there is a final determination of the cause and a judgment rendered in an action at law, or a final decree entered in a suit in equity, that the doctrine of *res judicata* is applicable. The rescript in the case merely sustained the defendant's exceptions. This was not a final judgment, and the defendant was not precluded by the

former adjudication from introducing evidence in support of his defence. *Hawks v. Truesdell*, 99 Mass. 557, 558. *Leverett v. Rivers*, 208 Mass. 241, 244. *Merrick v. Betts*, 217 Mass. 502, 503.

Although it was found at the first trial that the defence relied on was not established, it could not be said as matter of law there was no evidence to show the defendant was evicted or the lease surrendered. The evidence offered tended to show that the defendant did not occupy the store mentioned in the lease; that Butler, the duly authorized agent of the original plaintiffs, in February, 1915, after the written agreement between him and Minton was made, told the defendant's agent (Kenney) that he (Butler) had signed an agreement for a lease; and when Kenney said, "Then I am all through with the store and we have nothing more to do with it," Butler replied, "You are all through with the store and have nothing more to worry about;" that the defendant was willing to surrender the lease at any time after August, 1913, when he ceased to occupy the premises; that on March 1, 1915, the store was occupied by Campbell, and at Minton's request the defendant's agent delivered the keys of the premises to Campbell and collected the rents from him for seven weeks, paying the money to Davis, who thereafter collected the rent from Campbell until December of that year, when Campbell vacated the store; that this money was paid to the plaintiff Forrest W. Taylor who was authorized to act for the original plaintiffs; that no demand was made on the defendant for rent until August, 1915, when Kenney told Butler "they had nothing to do with the store, as Butler had told him, Kenney, the last of February that he, Butler, had signed an agreement for a lease, just as binding as a lease, and that the defendant . . . had nothing more to do with the store or worry about;" and that sometime between August and October Taylor was informed of this talk with Butler.

There was other evidence offered, indicating a surrender of the lease, which was proper for the consideration of the jury, and its exclusion may have injuriously affected the defendant's rights.

The evidence excluded also tended to show an eviction. The rent paid by the tenant Campbell was increased by Minton, Campbell was ordered by Minton's agent, at the request of Taylor, to remove a sign from the premises, and Taylor continued to accept the rents collected by Minton from Campbell. *Skally*

v. *Shute*, 132 Mass. 367. As the defendant may have been harmed by the exclusion of this evidence, and because there was error in excluding it, there must be a new trial.

Charles M. Thayer bought the entire premises in August, 1915, and leased them to Reidy, Drury and O'Connell on October 1, 1915, for a long term. No rent has been paid by the defendant since that time and the action is to recover the rent from October 1 to the termination of Kennedy's term. By arrangement between themselves, Taylor paid Thayer and Thayer paid Reidy the full amount of rent due under the defendant's lease until its termination. In *Taylor v. Kennedy*, 228 Mass. 390, at page 395, in speaking of the rights of the grantee (Thayer) it was said: "While the plaintiffs under the parol agreement have paid to the grantee the full amount of rent from the time of his purchase until the lease terminated, their rights to subrogation do not depend on these payments, which in so far as the debt is concerned were purely voluntary, but on the enforceable claims, if any, which the grantee has against the defendant." The present plaintiffs as the lessees of the entire building have the right to enforce the claim for rent accruing after October 1, 1915, (see *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491,) this rent having been paid by Taylor to Thayer and by him to the present plaintiffs. The original plaintiffs, by virtue of this arrangement between the parties, are entitled to whatever rent Reidy and his associates may have a right to recover from the defendant. The defendant was not discharged from his obligations under the lease by this arrangement, and, if his defence is not made out, he remains liable on the lease to the plaintiffs. As it was agreed between the parties that Thayer should look to Taylor for the rent of the Kennedy store, the fact that Thayer did not tell Taylor to collect the rents is not important. *Taylor v. Kennedy, supra*. See Sheldon on Subrogation, § 248.

It remains to consider some of the questions of evidence which may arise at another trial. The defendant offered in evidence a letter from Forrest W. Taylor to Kennedy, dated October 6, 1915, enclosing a bill for \$800 for rent to October 1, 1915. The original plaintiffs conveyed the property to Thayer in August, 1915, and Reidy, Drury and O'Connell, the present plaintiffs, became the lessees on October first of that year. When Taylor wrote to the

defendant, he was not the owner of the premises and his letters were not competent evidence in a suit by Reidy and his associates for rent accruing after October 1, 1915.

The defendant's offer to show the payment of \$900 by Campbell to Davis between the dates October 4 and December 20, 1915, was not admissible. The \$900 was not paid to the present plaintiffs, it was not paid by the defendant, and was not in payment of the rent which accrued after October 1, 1915.

The evidence of Taylor's change in his methods of collecting the rent after March 1, 1915, and that no attempt was made to collect rent from the Kennedy company after that date, was admissible as bearing upon the question of the surrender of the lease by Kennedy or the Kenney-Kennedy Company to the original lessors.

The evidence admitted under exception ten, that Kenney did not obtain the original lease from Taylor or Reidy, was competent.

As the ninth exception is waived by the defendant, we do not consider it.

The evidence excluded under exception eleven, while not admissible to prove the surrender of the lease to Reidy and his associates, was admissible for the purpose for which it was offered, that is, to show the basis of Davis's authority in collecting the rent and managing the leased premises.

What we have already said disposes of exception twelve; and the exception taken to the closing argument of the plaintiffs' counsel need not be considered.

Exceptions sustained.

MEMORANDUM.

On the sixteenth day of September, 1919, the Honorable William Caleb Loring resigned the office of a Justice of this court, which he had held since the seventh day of September, 1899.

ARIZONA COMMERCIAL MINING COMPANY vs. IRON CAP
COPPER COMPANY.

SAME vs. SAME.

Suffolk. May 19, 1919. — September 17, 1919.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Jurisdiction. Equity Jurisdiction.

The courts of this Commonwealth will not take jurisdiction of a suit in equity between two mining corporations, both organized in another State and operating adjoining mines in still another and distant State, which involves the title of the plaintiff to the mines alleged to belong to it from which the defendant took large amounts of ore of great value alleged to have been taken wrongfully.

Nor will the courts of this Commonwealth take jurisdiction of a suit in equity between the parties above described, where it is alleged that the mines of the plaintiff and the defendant have a common ingress of water and by reason of subterranean communication of water have a common drainage and that, in order that either of the mines can be worked, it is necessary to pump water from both mines, and where the plaintiff's alleged right to relief depends on the enforcement of a statute of the distant State providing that, if by reason of the failure of the owner of an adjoining mine to provide for the drainage thereof the owner of a mine is compelled to pump or drain the water from such adjoining mine, he can recover from the owner of such adjoining mine such owner's proportion of the expense of such pumping and draining.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court, as amended, on February 20, 1919, each by the Arizona Commercial Mining Company against the Iron Cap Copper Company, both being corporations organized under the laws of the State of Maine, having a place of business in Boston and conducting mining operations in the State of Arizona.

The allegations of the bills are described in the opinion. In each case the defendant filed a plea to the jurisdiction of the subject matter of the suit and also in each case demurred to the bill for want of jurisdiction.

In the first suit, called the "ore suit," the plea contained the following paragraph:

"That a competent court or competent courts exist within the State of Arizona having full jurisdiction to determine and adju-

dicate as between the plaintiff and the defendant the question of the title or ownership of the veins, lodes and ledges in said State of Arizona, the title or ownership of which is or may be in controversy between the plaintiff and the defendant, and any other questions material to the determination of the issues raised by the plaintiff's bill as amended."

In the second suit, called the "water suit," the plea quoted certain sections from the Revised Statutes of Arizona, 1913, including the following:

"Section 4047: Whenever adjacent or contiguous mines, occupied and worked upon the same or upon separate lodes have a common ingress of water or by reason of subterranean communication of water have a common drainage, it shall be the duty of the owners, lessees or occupants of said mine so related, to provide for their proportionate share of such drainage, or to prevent the water in such mine from flowing in or upon neighboring mines, thereby imposing upon them an unjust burden.

"Section 4048: If any owners, lessees or occupants of any such mine shall fail or neglect to provide for the drainage thereof, and by reason of such failure or neglect, the owners, lessees or occupants of any adjacent or contiguous mine are compelled to pump or drain or otherwise provide for the water flowing in from such first mentioned mine, then, and in such event the owner, lessees or occupants of the mine so in default, shall pay, respectively, to those performing the work of drainage their proportion of the actual and necessary cost and expense of pumping, draining or otherwise providing for said water, and if they fail or refuse to make such payment, the same may be recovered by an action in any court of competent jurisdiction."

The cases were heard together upon the pleas and demurrers by *Braley, J.*, who at the request of the parties reported them for determination by the full court.

The cases were submitted on briefs.

B. E. Eames & W. C. Rice, for the defendant.

E. F. McClennen, for the plaintiff.

CROSBY, J. These cases are reported to this court by a single justice, upon the bills as amended and the defendant's demurrers and pleas to the jurisdiction. The plaintiff and the defendant are corporations organized under the laws of the State of Maine;

each conducts mining operations in the State of Arizona and has a place of business in Boston.

The first or "ore" suit, so called, is brought to recover a debt for money had and received by the defendant to the use of the plaintiff for ores, which the plaintiff alleges were its property and were converted and sold by the defendant, and which came from portions of veins of ore owned by the plaintiff, who seeks to reach and apply to the payment of its debt the notes, stock and bonds referred to in the bill and to require the defendant to pay the plaintiff the proceeds received from such sales and to enjoin permanently the defendant from continuing to convert the plaintiff's ore. The bill alleges that the mining properties of the plaintiff are contiguous to and adjoin the properties claimed to be owned by the defendant; and that the plaintiff had the right of possession and took and had at all times in question the actual possession of the veins from which the ores described in the bill were extracted and sold by the defendant.

The bill also alleged that the amount of ore so converted and sold by the defendant is in excess of two hundred and fifty thousand tons, and that the amount received to the plaintiff's use from such sales is in excess of \$3,000,000; that the defendant has no property which can be attached or taken on execution in an action at law against it sufficient to satisfy the debt of the defendant to the plaintiff; that the defendant owns and has in its possession in Massachusetts certain promissory notes and bonds made by third parties, and certain shares of stock in other corporations which cannot be reached to be attached or taken on execution in an action at law, and that the plaintiff has no complete or adequate remedy at law.

If it be assumed that a personal or transitory action as distinguished from one merely local will lie to recover the value of the ores converted and sold by the defendant, (although the title to the veins from which the ore was extracted is involved,) and if it be conceded that the remedy sought is for the recovery of a debt within R. L. c. 159, § 3, cl. 7, as amended by St. 1910, c. 531, *Ginn v. Almy*, 212 Mass. 486, *H. G. Kilbourne Co. v. Standard Stamp Affixer Co.* 216 Mass. 118, the question remains whether, upon the facts as disclosed by the record, our courts will permit the suit to be maintained here or should decline to take jurisdiction.

In the second or "water suit," so called, the bill alleges that the plaintiff and the defendant occupy and operate mines in the State of Arizona which are adjacent to each other, that the plaintiff and the defendant have occupied and operated their respective mines continuously for more than six years last past, that these mines have a common ingress of water, and by reason of subterranean communication of water have a common drainage, and in order that the parties may work either of the mines it is necessary to pump water from both mines; that during all the period above referred to a statute known as "Revised Statutes of Arizona, 1913," has been in force in the State of Arizona, §§ 4047 and 4048 being set forth in full in the bill. Other sections of the statute pertinent to the questions involved are set forth in the defendant's plea.

The bill also alleges that by reason of the failure of the defendant to provide for the drainage of its mine the plaintiff has been compelled to pump and drain the water flowing in from the defendant's mine and has expended as the necessary cost of such pumping and draining a sum in excess of \$250,000; and that the defendant's proportion of that expense is in excess of \$150,000, which the plaintiff seeks to recover in this suit as a debt due to it from the defendant. The remaining allegations of the bill are similar to those contained in the bill in the first suit hereinbefore referred to.

If it be assumed in this case that the obligation created by the statute of Arizona gives the plaintiff a remedy which can be enforced in our courts, and that the plaintiff's claim is a debt within R. L. c. 159, § 3, cl. 7, as amended by St. 1910, c. 531, which may be reached and applied to the plaintiff's demand, the question arises, as in the first case, whether the plaintiff should be allowed to pursue the cause of action here, or our courts should decline to take jurisdiction.

It does not appear that the alleged debt in either case has been reduced to judgment. The parties plaintiff and defendant are both non-residents. The courts of equity in this State are not open to them as matter of right but only as matter of comity. The rule under these circumstances is well established by numerous decisions. It is stated by this court in *National Telephone Manuf. Co. v. DuBois*, 165 Mass. 117, at page 118, in these words: "If it appears that complete justice cannot be done here, or that the amount in-

volved is small and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded, if conducted here, with many and great if not insuperable difficulties, which will all be avoided without especial hardships to the plaintiff if suit is brought against the defendant in the State where he lives and where the alleged debt was contracted and where personal service can be made on him, we think that our courts should decline to take jurisdiction." *Smith v. Mutual Life Ins. Co. of New York*, 14 Allen, 336, 343. *Hancock National Bank v. Ellis*, 172 Mass. 39, 46. *Electric Welding Co. Ltd. v. Prince*, 195 Mass. 242, 256. *Rackemann v. Taylor*, 204 Mass. 394, 403. *Nashua River Paper Co. v. Hammermill Paper Co.* 223 Mass. 8, 18. *Richards v. Security Mutual Life Ins. Co.* 230 Mass. 320, 322. See also *Pierce v. Equitable Life Assurance Society*, 145 Mass. 56; *Peters v. Equitable Life Assurance Society*, 196 Mass. 143; *Converse v. Ayer*, 197 Mass. 443.

In the first case the plaintiff to recover must prove title to the ore alleged to have been converted and sold by the defendant. To establish that contention involves proof of the mining laws of Arizona and relates to a peculiar kind of real estate differing from that commonly litigated in our courts. Proof of the issues of fact involved would seem to be extremely difficult and expensive with witnesses at so great a distance. It is manifest that the defendant will be subjected to great and unnecessary expense if compelled to litigate these cases, and that the trials thereof will be accompanied by difficulties which can be avoided without apparent hardship to the plaintiff if it brings these suits in the courts of Arizona. In addition it appears that the remedy which the plaintiff seeks in the second or "water suit" is founded upon certain statutes of Arizona that relate to the operation of mines in that State which require the removal of water therefrom. A plausible argument can be made that the remedy given by the statutes is merely local. If that is the correct construction of the statute (which we need not determine in view of the conclusion reached), the remedy must be sought in the courts of Arizona. *Post & Co. v. Toledo, Cincinnati, & St. Louis Railroad*, 144 Mass. 341, 345. *Hancock National Bank v. Ellis*, 166 Mass. 414, 418. *Kimball v. St. Louis & San Francisco Railway*, 157 Mass. 7. The nature of the issues likely to be involved are such as may make

a view of the premises involved highly desirable if not essential in the determination of the cases.

The conclusion reached is in harmony with the decision in *Howarth v. Lombard*, 175 Mass. 570, in which it is stated that if the right "is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere." For the reasons stated and because it is extremely doubtful whether our courts are capable of doing complete justice to the parties, we are of the opinion that this court should decline to take jurisdiction in either suit. *New Haven Horse Nail Co. v. Linden Spring Co.* 142 Mass. 349, 353. *Post & Co. v. Toledo, Cincinnati, & St. Louis Railroad*, *supra*.

The language of this court in *Smith v. Mutual Life Ins. Co. of New York*, 14 Allen, 336, at page 343, seems pertinent to the cases at bar. Mr. Justice Wells there said, "But aside from the question of power depending on the right of jurisdiction, we regard it as within the province of this court, sitting as a court of equity, in its discretion, to decline to exercise jurisdiction in such cases; referring parties to the tribunals of the State upon whose laws their relations and rights particularly depend, and where alone they can be effectually and properly administered."

In reaching this conclusion we are not unmindful of nor unsympathetic with the modern tendency to assume jurisdiction as matter of comity, when reasonably practicable, of causes of action arising in other jurisdictions. See, for example, *Stone v. Old Colony Street Railway*, 212 Mass. 459, 464, 465, and *Hanlon v. Frederick Leyland & Co. Ltd.* 223 Mass. 438, 440, 441.

It results that in each case the plea should be sustained and the bill dismissed without prejudice.

So ordered.

MEMORANDUM.

On the twenty-fourth day of September, 1919, the Honorable Charles Francis Jenney, who had been one of the Justices of the Superior Court since the first day of December, 1909, was appointed a Justice of this court, first taking his seat with the full court at Worcester on the twenty-ninth day of September, 1919.

FRANK R. AUSTIN vs. CORA B. AUSTIN.

Essex. September 10, 1919. — October 8, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Marriage and Divorce. Judgment. Res Judicata.

Upon a petition by a wife for separate support on the ground that the respondent had deserted her and that she was living apart from him for a justifiable cause, the husband's sole ground of defence was that he was justified in leaving his wife because of her cruel and abusive treatment of him, and the Probate Court made a decree, affirmed on appeal, to the effect that the husband had deserted his wife and that she was living apart from him for justifiable cause and awarding her a certain amount a week for her support. Later the husband filed a libel for divorce, alleging cruel and abusive treatment, and the libellee set up in defence the decree in the proceedings for separate support. The acts of cruel and abusive treatment alleged in the libel for divorce were substantially the same as those that the husband had set up in the proceedings for separate support. *Held*, that the decree was a bar to the maintenance of the libel.

LIBEL FOR DIVORCE, filed on June 14, 1917. The libel and the answer of the libellee are described in the opinion.

The case was tried before *Quinn, J.* The facts in regard to the proceedings on the petition for separate support are stated in the opinion. The stenographic report of the evidence in those proceedings was put in evidence. The libellee contended that the decree of the Probate Court on that petition, affirmed by the Superior Court, in favor of the libellee upon the issue of her alleged cruel and abusive treatment of the libellant was an adjudication of that issue and was a bar to the maintenance of the libel. The judge sustained the libellee's contention and ordered that the libel be dismissed. The libellant alleged exceptions.

The case was submitted on briefs.

S. Parsons & W. F. Craig, for the libellant.

E. S. Underwood, for the libellee.

CROSBY, J. This is a libel for divorce brought by a husband against his wife in which cruel and abusive treatment and desertion are alleged, but the only ground relied on is that of cruel and abusive treatment. The libellant filed seven specifications of

alleged acts of cruelty. The answer and amended answer contain a general denial and allege that the libellant deserted the libellee and was cruel and abusive in his treatment of her. The amended answer also avers "that all of the matters and things relied upon by the libellant in the above entitled cause as grounds for a divorce were fully and finally adjudicated before the filing of said libel in a proceeding for separate support heretofore heard and determined in the Probate Court for said County of Essex and upon appeal by a decree of this Court."

In February, 1914, the libellee filed in the Probate Court for the county of Essex a petition for separate support against the libellant, alleging that on or about January 5, 1914, and on or about February 3, 1914, he was cruel and abusive in his treatment of her, and that on the last named date he deserted her. After hearing upon this petition a decree was entered in the Probate Court to the effect that the husband had deserted his wife and that she was, for justifiable cause, actually living apart from him; and it provided that he should pay \$12 a week for her support. Upon appeal to the Superior Court this decree was affirmed.

At the hearing of the libel, the libellee introduced in evidence the entire stenographic record of the testimony introduced in the Probate Court at the hearing on the petition for separate support, the material portions of which are printed in the record. The last act of cruel and abusive treatment relied on by the libellant is alleged to have occurred on February 3, 1914, when, he testified, his wife struck and kicked him and that immediately thereafter he left her because he was afraid of physical injury. The parties have never lived together since, and later in the same month the petition for separate support was filed. The judge of the Superior Court before whom the libel was heard ordered it dismissed, and the libellant excepted.

The petition in the proceeding for separate support alleged that the respondent had deserted the petitioner and that she was living apart from him for a justifiable cause; the respondent contended that he left his wife because she had assaulted and threatened him and that he was afraid to live with her. In other words, he contended that he was justified in leaving his wife and living apart from her because of her cruel and abusive treatment of him.

The Probate Court had jurisdiction of the case, and its decree

is binding and conclusive upon the parties in this suit in regard to all matters which were put in issue or which are shown to have been necessarily involved in the former suit and actually tried and determined by it. *Miller v. Miller*, 150 Mass. 111. *Watts v. Watts*, 160 Mass. 464. *Harrington v. Harrington*, 189 Mass. 281. It plainly appears by the pleadings and reported evidence that the issue whether the libellant had been cruelly and abusively treated by the libellee was necessarily involved and was actually tried and determined in the Probate Court. That the husband was justified in leaving his wife because of her cruel and abusive treatment was his sole ground of defence in the proceeding for separate support. The decree of the Probate Court in favor of the wife conclusively shows that the court found either that the matters charged did not justify his leaving her, or that they were not proven, or that he had lived with her after the acts complained of and therefore they had been condoned by him. The alleged acts of cruel and abusive treatment upon which the respondent in the probate proceeding relied, and which were adjudicated, are substantially the same as those specified and testified to in the present suit.

The decree of the Probate Court is a bar to the maintenance of the libel.

Exceptions overruled.

HAROLD S. RENWICK & another vs. WILLIAM B. MACOMBER.

Bristol. March 3, 1919. — October 9, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Will, Attesting witness, Notice of petition. *Notice*, *Res Judicata*. *Judgment*.
Probate Court, Petition to vacate decree.

- A witness to a will is not disqualified by reason of interest because at some time before the making of the will the person named in the will as executor and sole legatee agreed in writing to give him a third interest in any amount which should come to such person from a certain fund, whether it should come to him under the will or by assignment from one of two persons other than the testator.
- A general notice by publication of a petition for the allowance of a will and the mailing of copies of such notice to all persons interested in the estate of the alleged testator are sufficient for the purpose of allowing the will, even if the notice failed to reach the next of kin of the alleged testator.

A rescript of this court not followed by a final decree of the trial court cannot be set up as *res judicata*.

The Probate Court has no power to vacate a decree made by that court, many years before, allowing a certain will in a case where the court had jurisdiction of the parties and the subject matter, upon proof that the will was procured by undue influence on the part of the executor, who was also the sole legatee, and who knew or should have known that the alleged testator was not competent to make a will, even assuming that the executor perpetrated a fraud upon the Probate Court in procuring the allowance of the will.

APPEAL from a decree of the Probate Court for the county of Bristol made on March 29, 1918, among other things revoking a decree of that court made on August 2, 1907, allowing a certain instrument as the last will of Frederick W. Renwick.

The case was heard by *De Courcy, J.*, who made certain findings of fact, including those that are stated in the opinion, and reserved the case for determination by the full court. The finding of the single justice in regard to an attesting witness of the will alleged to have been disqualified by interest was as follows: "A. Edwin Clark, Mr. Macomber's attorney, was one of the attesting witnesses to the will. He became incapacitated December 3, 1906. It appears that at some time before the making of the will, Mr. Macomber in writing agreed to give to him one third interest in the 'trust fund.' The petitioners contend that Mr. Clark was thereby disqualified by interest from being a subscribing witness. If that issue is open under this petition, I find that the respondent Macomber did not at that time believe that the 'trust fund' under the will of Annie E. Renwick, [the stepmother of the alleged testator] in which said Frederick W. Renwick had a life interest, would pass under Frederick's will; but that the agreement was to pay to Mr. Clark one third of the amount which Macomber might finally recover of that fund, — whether it should come to him under the will, or under the assignment from Frederick's brother Stanhope, or under the assignment he later obtained from Henrietta H. Weeden, the residuary legatee of Annie E. Renwick's will."

The petitioners to whom the decree of revocation was granted were alleged to be the only next of kin of Frederick W. Renwick.

The case was argued at the bar in March, 1919, before *Rugg, C. J., De Courcy, Crosby, Pierce, & Carroll, JJ.*, and afterwards was submitted on briefs to all the Justices except *Jenney, J.*

E. J. Hadley, (*B. B. Barney* with him,) for the respondent.

C. R. Cummings, for the petitioners.

PIERCE, J. The case is before us on a reservation by a single justice and is an appeal by the respondent from a decree of the Probate Court entered March 29, 1918, revoking its decree of August 2, 1907, allowing the will of Frederick W. Renwick. Frederick W. Renwick, although described in the will as of New York, at the trial of the appeal upon ample evidence was found by the single justice to have had his domicile at the time when the alleged will was executed, and until his death, in New Bedford, Massachusetts. It follows that the probate proceedings were properly had in the county of Bristol in this Commonwealth.

The assignment of Macomber to the attesting witness Clark, conferred upon Clark at the most an interest in a fund which was contingent upon the death of Frederick W. Renwick without leaving a child or children. This was not such a present vested pecuniary interest in the property to be disposed of under the will as rendered the witness incompetent. *Hawes v. Humphrey*, 9 Pick. 350. *Northampton v. Smith*, 11 Met. 390, 396. *Luke v. Leland*, 6 Cush. 259. *Boston Safe Deposit & Trust Co. v. Bacon*, 229 Mass. 585.

The general notice by publication of the petition for probate of the will, and the mailing of a copy thereof to those interested in the estate, were sufficient to justify the final decree admitting the will to probate, even if it failed to reach the petitioners in this appeal. *Bonnemort v. Gill*, 167 Mass. 338, 340.

The jurisdiction of the court, which allowed the will without objection on the testimony of one witness only, was perfect over the parties and subject matter.

The decision in *Renwick v. Macomber*, 225 Mass. 380, is not *res judicata* of the pending issue for the reason, among others, that no final decree has been made in the Supreme Judicial Court after rescript.

The facts reported do not in terms or by inference establish that the testimony of the single witness was fabricated and perjured, and are entirely consistent with the presumption of the honesty of the witness and of his purpose to state the truth and the whole truth as he understood it.

The facts found incontrovertibly prove that Macomber, the

executor nominated in the will, while trustee of a fund held by himself and another for the benefit of the testator, was on terms of closest intimacy with the testator from 1902 until the death of the testator in 1907; they also establish that Macomber by reason of such relation and intimacy had knowledge that the testator was a victim of syphilis and paresis, that when he executed the will, and for a year before, he manifested unsoundness of mind by conduct and delusion, and that when he died less than a year thereafter he died of paretic dementia.

It is specifically found that the testator "left all his estate to Mr. Macomber, and in case he predeceased him, to Mr. Macomber's children;" as also "that the will was procured by undue influence on the part of the respondent Macomber . . . that the respondent perpetrated a fraud upon the Probate Court by procuring the probate of the alleged will of Frederick W. Renwick, when he knew or should have known that Renwick was not competent to make a will, and that the instrument was procured by his (the respondent's) undue influence." Assuming, without deciding, that the single justice rightly found that fraud in fact was perpetrated on the Probate Court by the failure of the executor, who was also sole legatee, to make known to the court, when he offered the will for probate, material facts which, disclosed, would have demonstrated that Frederick W. Renwick was not of sound and disposing mind and memory when he signed the alleged will, and would have shown that the executor and legatee, by reason of the unsoundness of the mind of the testator and of the undue influence which the executor was thereby enabled to exercise, was made sole legatee, the only question presented is whether a decree of probate can be vacated after the time for an appeal from the decree has passed, upon proof of such concealment and suppression of facts.

It was said in *Zeitlin v. Zeitlin*, 202 Mass. 205, that "It is in the interests of justice that, after a trial and final judgment in a case, the matters heard and adjudicated shall not be opened for a further hearing because of a supposed error in the determination of facts by the tribunal that heard the evidence. A contention that some part of the material testimony was false might be made with plausibility in a large proportion of the cases that are tried. A contention that the prevailing party knowingly gave or procured

false testimony, upon an issue involved, might be made and strongly supported in a great many cases. It is against public policy to open cases on no other ground than this." The suppression or concealment of material facts as distinguished from the introduction of false and fabricated testimony does not, and in principle should not, change the accepted rule of public policy that litigation should cease when parties have had a day in court.

The petitioners do not question that the rule of *Zeitlin v. Zeitlin*, *supra*, affirmed in *Boyd v. Boyd*, 226 Mass. 542, is the settled doctrine when applied to courts of common law jurisdiction, but contend that it does not obtain in probate courts on petitions to vacate their decrees. Conformity in rules concerning the integrity of judgments of all courts of superior and general jurisdiction should obtain when possible. The probate courts since St. 1891, c. 415, § 4, are courts of superior and general jurisdiction, and are of the same dignity as common law and equity courts. Whatever may be found of decision and *dicta* before 1891, since St. 1891, c. 415, § 4, no case governing probate proceedings has been decided which is in conflict with *Zeitlin v. Zeitlin*, *supra*; and that case must be taken to have established the law relating to the vacation of judgments for all courts of superior and general jurisdiction without regard to their history, origin or practice.

We find nothing in conflict in the decisions of the cases of *Stetson v. Bass*, 9 Pick. 26, *Peters v. Peters*, 8 Cush. 529, *Waters v. Stickney*, 12 Allen, 1, *Newton v. Seaman's Friend Society*, 130 Mass. 91, *Gale v. Nickerson*, 144 Mass. 415, *Tucker v. Fisk*, 154 Mass. 574, *McKay v. Kean*, 167 Mass. 524, *Wilton v. Humphreys*, 176 Mass. 253, *Crocker v. Crocker*, 198 Mass. 401, and *Boardman v. Hesselstine*, 200 Mass. 495.

A majority of the court are of opinion the decree appealed from should be reversed, and a decree entered dismissing the petition praying for revocation of the decree allowing the will of Frederick W. Renwick.

Decree accordingly.

COMMONWEALTH vs. THOMAS O'NEIL

Berkshire. September 9, 1919. — October 9, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Municipal Corporations, By-laws and ordinances. *Constitutional Law*, Interstate commerce. *Practice*, Criminal, Report of judge. *Words*, "Memorandum."

An ordinance of a city entitled "Hackney Carriages, Trucks, Drays, etc.," passed under R. L. c. 25, § 24, before the enactment of St. 1916, c. 293, which prohibits any person from using or driving any "hack, coach, cab, or other vehicle . . . drawn by one or more horses, or propelled by power," for the conveyance of persons for hire from place to place within the city without a license from the mayor and aldermen and imposes a penalty for violation of its provisions, was held not to apply nor to be intended to apply to the use or driving of a motor vehicle devoted exclusively to the transportation of passengers for hire between a city in another State and a city in this Commonwealth, and a person engaged solely in such interstate commerce cannot be prosecuted under the ordinance for driving without a license.

After the conviction of a defendant in the Superior Court for a criminal offence, a report of the trial judge under R. L. c. 219, § 34, at the request of such defendant, of a question of law, which in the opinion of the judge is so important or doubtful as to require the decision of this court, should be signed by the judge and should state the question of law and recite or refer to facts or parts of the record sufficient to make intelligible the question of law reported.

It here was pointed out that the word "memorandum" is not an accurate designation of such a report.

COMPLAINT, received and sworn to on June 19, 1919, in the District Court of Central Berkshire, charging that the defendant at Pittsfield on June 18, 1919, did use or drive an automobile in Pittsfield for the conveyance of persons for hire in the city of Pittsfield without having a license so to do.

On appeal to the Superior Court the defendant was tried before N. P. Brown, J., upon an agreed statement of facts, which was as follows:

"Thomas O'Neil, operates a motor vehicle, making a daily trip from the Ten Eyck Hotel in Albany, New York, to the Wendell Hotel in Pittsfield, Massachusetts, and return carrying passengers for hire between said termini.

"A copy of an ordinance of the city of Pittsfield is hereto

attached, a Revised Ordinance of the city of Pittsfield approved May 28, 1915, c. 23, §§ 1, 2.

"The defendant has no license or permit to carry passengers for hire from place to place within said city as required by said ordinance. Passengers are only accepted for the entire trip. A trip was made on the day alleged in the complaint."

The ordinance is described in the opinion. The defendant made a motion in writing asking the judge to order a verdict of not guilty.

The following unsigned statement was attached to the record entitled "Memorandum of court:"

"By agreement of the Commonwealth and the defendant, in open court, a jury was impaneled and the above mentioned agreed statement of facts was read to the jury as the sole evidence in the case. After the reading of this evidence the defendant's counsel presented the motion which is above set forth requesting the court to direct a verdict of not guilty, which motion the court refused to grant and thereafter directed the jury to render a verdict of guilty.

"To the court's refusal to direct a verdict of not guilty, as well as the court's direction of a verdict of guilty, the defendant duly objected and requested that his exceptions to such direction and refusal to direct be duly noted; the court thereupon saved the defendant's exceptions and ordered that they be duly noted.

"Whereupon, in open court, counsel for the Commonwealth and counsel for the defendant jointly requested the court to report the case to the full bench of the Supreme Judicial Court for final determination, stipulating that, if the verdict of the jury is warranted by law, the defendant shall stand convicted; if the verdict of the jury is not warranted by law, it shall be set aside and the defendant discharged."

J. Fallon, for the defendant.

J. B. Ely, District Attorney, & *J. M. McMahon*, Assistant District Attorney, for the Commonwealth, submitted a brief.

RUGG, C. J. This is a complaint charging the defendant with using or driving an automobile for the conveyance of persons for hire without a license, contrary to the terms of an ordinance of the city of Pittsfield. That ordinance among other matters prohibits any person from using or driving an automobile for the

transportation of persons for hire from place to place within the city without a license from the mayor and board of aldermen, which may be subject to such conditions as the licensing officers "may deem expedient and may be revoked at their discretion," and imposes a penalty for violation of its provisions. The agreed facts show that the defendant at the time alleged operated a motor vehicle, making a daily trip from the Ten Eyck Hotel in Albany in the State of New York to the Wendell Hotel in Pittsfield in the county of Berkshire, and return, carrying passengers for hire accepted only for the entire trip between these two points. He had no such license as the ordinance required. The defendant contends that he was engaged in interstate commerce exclusively, and hence that a verdict of not guilty ought to have been directed.

It is plain that the business in which the defendant was engaged was exclusively interstate commerce. "From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities." *United States v. Hill*, 248 U. S. 420, 423.

It becomes necessary to examine decisions respecting the legitimate field of police regulations affecting interstate commerce, and to determine the scope and meaning of the ordinance in the light of such permanent principles as have been established.

It was held in *Commonwealth v. Peoples Express Co.* 201 Mass. 564, that a statute requiring a local license for the transportation of intoxicating liquors into a city or town, in which licenses of the first five classes for the sale of intoxicating liquor were not granted, by any person or corporation other than a railroad or street railway corporation would be unconstitutional if construed as applicable to interstate commerce. It, therefore, was decided that the intent of the Legislature was to restrict its operation to intrastate commerce, as to which it was valid.

In *Adams Express Co. v. New York*, 232 U. S. 14, one point raised was whether an ordinance of the city of New York which prohibited the exercise of the business of "expressmen" except under an annual license granted by the mayor and revocable by him, would be valid if held applicable to interstate business. It was said at page 31 that, if the provisions of the ordinance "be deemed to require that a license must be obtained as a con-

dition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional. It is insisted that, under the authority of the State, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to federal legislation. . . . It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 496; *Leloup v. Mobile*, 127 U. S. 640, 645; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; *Rearick v. Pennsylvania*, 203 U. S. 507; *International Textbook Co. v. Pigg*, 217 U. S. 91, 109; *Oklahoma v. Kansas Natural Gas Co.* 221 U. S. 229, 260; *Buck Stove Co. v. Vickers*, 226 U. S. 205, 215; *Crenshaw v. Arkansas*, 227 U. S. 389; *Minnesota Rate Cases*, 230 U. S. 352, 401. As was said by this court in *Crutcher v. Kentucky*, 141 U. S. p. 58, 'a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.'" Arguments that that ordinance might be upheld as imposing a fee for the use of streets, as based on the nature of the business, or as inspection charges, were summarily disposed of as inapposite or inadequate. To the same effect is *United States Express Co. v. New York*, 232 U. S. 35. In *Sault Ste. Marie v. International Transit Co.* 234 U. S. 333, the appellant city passed an ordinance requiring a license for the operation of a ferry "across the St. Mary's River to the opposite shore" in the province of Ontario. It was held that the action of the city "in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf," of maintaining an office and receiving fares for passage upon steam ferry boats which

touched there for the purpose of receiving and discharging passengers and freight, "was beyond the power which the State could exercise either directly or by delegation." It was said at page 341, "The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

On the other hand a large group of laws, general in their operation and affecting interstate commerce only incidentally, are not unconstitutional. *Wilmington Transportation Co. v. California Railroad Commission*, 236 U. S. 151. *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 258, *et seq.* *Atlantic Coast Line Railroad v. Georgia*, 234 U. S. 280. *Denver & Rio Grande Railroad v. Denver*, 250 U. S. 241, 246. *Port Richmond & Bergen Point Ferry Co. v. Hudson County*, 234 U. S. 317. *Commonwealth v. Moore*, 214 Mass. 19. See cases collected in *Commonwealth v. Peoples Express Co.* 201 Mass. 564, at page 578. See, as to automobiles, *Commonwealth v. Newhall*, 205 Mass. 344; *Commonwealth v. Gile*, 217 Mass. 18. See also, *Commonwealth v. Closson*, 229 Mass. 329. Two recent decisions of the United States Supreme Court approach nearest, among this class of adjudications, to the case at bar. An attack was made in *Hendrick v. Maryland*, 235 U. S. 610, upon a statute, general in scope and applicable alike to all owners or users of automobiles or motor vehicles, which required registration and a fee roughly proportioned to the horse power of the vehicle. No person was permitted to drive a car unless licensed after payment of a fee. Other sections related to speed, the law of the road, accidents, signals and kindred matters. Exceptions were made for the benefit of non-resident owners or operators under specified limitations. The fees confessedly were for revenue and not merely to cover inspection charges. In the course of an opinion sustaining the constitutionality of the statute, it was said (at page 622): "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive;

and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious. In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles — those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines — a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce." In *Kane v. New Jersey*, 242 U. S. 160, the constitutionality of a statute requiring, in addition to general license and registration and fee, the appointment of a resident agent by non-resident owners of automobiles was upheld. The reason for sustaining the validity of the laws assailed in those two decisions, as succinctly stated in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 245, was that they imposed "license fees upon motor vehicles, graduated according to horse-power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious."

The ordinance here in question must be examined and interpreted with reference to these decisions and the principles which they declare. Every rational presumption in favor of its validity must be indulged, and it will not be denounced as contrary to the

Constitution unless its language is so clear and explicit as to render impossible any other reasonable construction. *Perkins v. Westwood*, 226 Mass. 268, 271, and cases collected.

The title of the ordinance (to which reference may be made in order to ascertain its meaning, *Proprietors of Mills on Monatiquot River v. Randolph*, 157 Mass. 345, 356,) is "Hackney Carriages, Trucks, Drays, etc." It is provided by § 1 that "Every hack, coach, cab, or other vehicle, whether on wheels or runners, drawn by one or more horses, or propelled by power and used for the conveyance of persons for hire from place to place within the city, shall be deemed a hackney carriage. . . ." Section 2 relates to the granting of licenses, and § 3 provides that the licensee shall be considered the owner. It is the effect of § 4, that distinguishing marks of specified color containing the number of the license shall be upon the outside of the carriage, and a card with the owner's name and "the rates of fare fixed by the board of aldermen" upon the inside. The use of any other number than that designated in the license is prohibited by § 5. The duty is cast upon the board of aldermen by § 6 to establish fares for the conveyance of passengers and their baggage, while the demand or receipt of a higher fare and the unreasonable refusal to carry a "passenger from place to place within the city" is prohibited by § 9. The wearing of a badge easily to be seen and read upon the hat or cap of every person in charge of a hackney carriage, while at a railroad station, is required by § 7. Driving by persons under eighteen years of age without special permission from the board of aldermen is forbidden by § 8. The provisions of § 10 relate to fees and terms of licenses. The use of stands for hire, other than those designated by the chief of police, is interdicted by § 11 while by § 12 the solicitation of patronage by unlicensed persons is prohibited. The final section fixes a penalty for violation of the provisions of the ordinance.

This ordinance was approved in 1915. It is manifest from this circumstance as well as from its terms that it was not adopted pursuant to St. 1916, c. 293, which confers upon such cities and towns as accept its provisions certain powers to license and regulate transportation of passengers for hire by motor vehicles. The decisions in *Commonwealth v. Slocum*, 230 Mass. 180, and *Commonwealth v. Theberge*, 231 Mass. 386, which arose under that statute, have no pertinency to the facts here disclosed.

It is apparent from the analysis of the ordinance that its main design is to regulate purely local matters. It was enacted under the authority of R. L. c. 25, § 24. It is not framed to prevent the dangerous operation of motor vehicles, to ensure safety and convenience of travel upon streets, to require skilled drivers of motor vehicles, or to facilitate the receiving or discharge of passengers. Some of these and kindred matters in considerable part are within the sweep of St. 1909, c. 534, and its amendments, which relate to the registration and operation of motor vehicles and the licensing of those who drive them, all by a board of State officers. Many of the provisions of the ordinance, particularly those respecting the establishment of rates of fare by the board of aldermen, manifestly have no relevancy to the kind of business conducted by the defendant. Such rates in the nature of things could be operative only within the boundaries of the city. The requirements for markings upon the vehicles, with the numbers of licenses, also are not applicable to him. The ordinance in its general scope and apparent purpose does not fall within the class which was upheld in *Hendrick v. Maryland* and *Kane v. New Jersey*, both *ubi supra*. We incline to the view that, if by its express terms made applicable to interstate commerce, this particular ordinance under the circumstances here disclosed would fall within the inhibitions of such decisions as *Adams Express Co. v. New York*, *ubi supra*. But it is not so made applicable. A statute, ordinance or other regulation in the nature of a legislative enactment which would be unconstitutional as applied to a certain class of cases and is constitutional as applied to other classes, may be held to have been intended to apply only to the latter, if that appears to be in harmony with the purpose of the body exercising the legislative power. *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, 241. Rightly construed and interpreted the ordinance here in question does not and was not intended to apply to the use or driving of a motor vehicle devoted exclusively to the transportation of passengers between Albany in the State of New York and Pittsfield in this Commonwealth. It has an ample scope for its potency by construing it as regulating only intrastate traffic and as not including interstate commerce. Since the only use or driving of an automobile for the conveyance of persons for hire with which the defendant was connected was interstate commerce,

a verdict of not guilty ought to have been directed. His request to that effect should have been granted.

The presentation of the case to this court is informal. A judge of the Superior Court may, after the conviction of a person, report a question of law arising upon the trial which in his opinion is so important or doubtful as to require the decision of this court, if the defendant desires or consents to it. R. L. c. 219, § 34. Such a report should state the question of law. The report in the case at bar does not state any question of law. It refers among other matters to a copy of "memorandum of the court" as "annexed." That paper, which is at the end of the record and which does not appear to be signed by the judge, states a ruling of law made by the judge and recites a request for a report of it to this court by counsel for the defendant. The report over the signature of the judge should state the question or questions of law arising upon the trial of the person convicted, and recite or refer to facts or parts of the record sufficient to make intelligible the question or questions of law reported. The use of the word "memorandum" in such connection, although grown somewhat common, is not accurate. The function of a judge is to decide questions presented to him. He does this either by making a finding of the facts or a ruling as to the law, or by doing both, no one of which rightly is describable as a memorandum. This matter does not affect the merits of the case and is referred to only that simple and correct practice may be promoted.

Verdict set aside.

Defendant to be discharged.

JOHN A. SULLIVAN & others vs. SECRETARY OF THE
COMMONWEALTH.

Suffolk. September 10, 1919. — October 9, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Jurisdiction, Of full court. Constitutional Law, Referendum.

The full court in considering what justice requires as to the disposition of any case must consider changes in fact or in law or subsequent events decisively affecting the remedy sought, which are called in a proper manner to the attention of the court as having happened since the proceeding was instituted.

The full court has no power to decide abstract questions of law inapplicable to any subsisting right.

Upon a petition for a writ of mandamus addressed to the Secretary of the Commonwealth commanding him to provide the petitioners with blanks for the use of subsequent signers of a petition filed under art. 48 of the Amendments to the Constitution asking for a referendum on a joint resolution of the General Court, in accordance with a stipulation of the parties filed in court in order to protect the rights of the petitioners the Secretary of the Commonwealth provided the requested blanks for the use of the subsequent signers under art. 48 without prejudice to the determination of the case presented by the petition for mandamus, and, after the case had been reserved for determination by the full court but before it was decided, it was brought properly to the attention of this court that the number of signatures required by art. 48, III, § 3 of the Amendments had not been filed within the designated time, so that the question whether the Secretary of the Commonwealth was right or wrong in refusing to furnish the blanks to the petitioners had become wholly a moot question. *Held*, that the court had no power to pass upon the abstract question and that the petition must be dismissed.

PETITION, filed on July 30, 1919, by ten qualified voters for a writ of mandamus addressed to the Secretary of the Commonwealth, commanding him to provide the petitioners with blanks for the use of subsequent signers of a petition, filed with the respondent under the provisions of art. 48 of the Amendments to the Constitution, asking for a referendum on a joint resolution of the General Court ratifying the proposed amendment to the Constitution of the United States extending the right of suffrage to women.

The following stipulation, signed by the attorney for the petitioners and by the Assistant Attorney General, was filed in court:

"It is hereby agreed in the matter of the above-entitled petition, in order to protect the rights of the petitioners, that the respondent, as Secretary of the Commonwealth, shall provide blanks, duly printed, for the use of subsequent signers, as provided in Amendment 48 of the Constitution of the Commonwealth, and that the said respondent, as Secretary of the Commonwealth, shall permit the subsequent signatures to be filed as provided in said amendment; but it is expressly understood and agreed that such action by the said respondent, as Secretary of the Commonwealth, shall be without prejudice to the determination by the court of any issue or issues presented by said petition."

By a communication to this court from the Attorney General, dated October 2, 1919, reporting information received from the

Secretary of the Commonwealth, it appeared that the number of signatures upon the petition at the expiration of ninety days after the resolution in question became a law was twelve thousand, six hundred and twenty-eight, thus falling short of the fifteen thousand required by art. 48, III, § 3 of the Amendments to the Constitution.

This was admitted to be true by the counsel for the petitioners, who stated that the failure to secure a total of fifteen thousand signatures was no fault of counsel.

The case came on to be heard before *Pierce, J.*, who reported it for determination by the full court upon the petition and answer.

The case was submitted on briefs.

L. Weyburn & H. W. Packer, for the petitioners.

H. A. Wyman, Attorney General, & *C. W. Mulcahy*, Assistant Attorney General, for the respondent.

Rugg, C. J. This is a petition for a writ of mandamus to compel the Secretary of the Commonwealth to furnish to the petitioners the blanks which he appears to be required to furnish by art. 48 of the Amendments to the Constitution in case of a referendum petition, and otherwise to recognize rights claimed to exist by that amendment. The purpose of the proceeding is to secure a referendum on the joint resolution of the General Court ratifying an amendment to the Federal Constitution which extends the right of suffrage to women. The respondent refused to act as requested, on the ground that the joint resolution was not subject to a referendum. Pending a hearing upon the petition, a stipulation was entered into whereby the respondent provided the required blanks for the use of signers in order to protect the rights of the petitioners, but without prejudice to the determination by the court of the issues raised on this petition. Thereafter the case was reported by a single justice to the full court and has been submitted on briefs. Before it was practicable to reach a determination of the question of law presented and to prepare an opinion expressive of the decision, it came to the attention of the court that a sufficient number of signatures required by the so called referendum amendment had not been filed within the time limited.

In considering what justice requires as to the disposition of any cause, the court must consider changes in fact or in law and other

subsequent events decisively affecting the relief to be afforded, which have been called to its attention as having supervened since the proceeding was instituted. *Watts, Watts & Co. Ltd. v. Unione Austriaca Di Navigazione*, 248 U. S. 9, 21. *Ensign v. Faxon*, 229 Mass. 231, and cases collected at page 233.

It is manifest that the inquiry whether the Secretary of the Commonwealth was right or wrong in his refusal to furnish the blanks to the petitioners has become wholly a moot question. It can have no practical result. No facts exist which can authorize relief to the petitioners. In any event, there can be no referendum. Any decision which might be rendered would relate to an abstract question of law inapplicable to any subsisting right. Courts are not established for the discussion of such questions. Said Mr. Justice Gray in *California v. San Pablo & Tulare Railroad*, 149 U. S. 308, 314, "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

This principle has been frequently declared, has not been doubted, and is indisputable. It lies at the foundation of the common law. *Kimball v. Kimball*, 174 U. S. 158. *Mills v. Green*, 159 U. S. 651, 653. *Berry v. Davis*, 242 U. S. 468. *Swift & Co. v. Hocking Valley Railway*, 243 U. S. 281, 289. *Postal Telegraph-Cable Co. v. Montgomery*, 193 Ala. 234, 237. *Duggan v. Emporia*, 84 Kans. 429, 440. *Pittinger v. Gratz*, 157 Ky. 401. *Funk & Wagnalls Co. v. Stamm*, 56 Vroom, 301, 303. *Pacific Livestock Co. v. Mason Valley Mines Co.* 39 Nev. 105. The conclusion is irresistible that for this reason the entry must be

Petition dismissed.

SAMUEL D. CONANT, administrator, vs. JOHN N. ST. JOHN & others.

Franklin. September 16, 1919. — October 9, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Trust, Construction, Termination, Conversion of real estate. Words, "Legal representatives."

The will of a testatrix contained the following provision: "I . . . give and bequeath all my property, both real and personal, to my husband . . . him to have and to hold full use of same during his lifetime, and after his death . . . he is to divide all such within named property equally between all our children still living after his death. . . . In case any or all of our children die previous to our departure from this world, then, the property or its value is to be left to their children in same proportions as though they themselves were to receive it; were they still living." All the children were living and signed an instrument consenting to the sale by their father of real and personal property in which they agreed to join, and providing that after certain payments the balance of the proceeds should be deposited by their father with a certain trust company under a trust agreement to be entered into between him and the trust company by which the trust company should hold the fund in trust to pay to their father the net income thereof and "at his death to his legal representatives." The deposit was made and the agreement between the father and the trust company contained a provision that upon his death the trustee should pay the principal of the fund to his legal representatives "freed from all trusts." The father married again and died intestate leaving his second wife as his widow and all his children living. *Held*, that the will created a trust for the benefit of the husband of the testatrix during his life with a remainder to the children, which might be contingent, but that, whether it was contingent or vested, the instrument signed by the children with their father, providing that at the death of their father the money should be paid "to his legal representatives," was in conformity in substance to the provisions of the will and did not change the terms of the trust created by it.

In the case above described it also was *held* that the provision in the agreement between the father and the trust company, that at his death the fund should be paid over to his legal representatives "freed from all trusts," did not affect the rights of the children, who were not parties to that agreement.

In the case above described it was *ordered* that the fund should be distributed among the children to the exclusion of the widow.

In the case above described it appeared that the father and children in "converting" the real estate into money and impressing it with a trust did so without resorting to proceedings in the Probate Court under R. L. c. 127, §§ 28, 29, 31, as amended by St. 1917, c. 306. They appeared to have commingled the proceeds of the real and personal estate in a single fund, but it was *said* that, even if the fund came from the proceeds of the real estate alone, the inference was inevitable that the trust with which it was impressed was the same to which,

if the terms of the statute had been followed, it ought to have been and would have been made subject.

In the same case it was *pointed out* that the husband and children had no right to terminate the trust as to the personal property nor as to the proceeds of the real estate, which had been made a part of the trust.

BILL IN EQUITY, filed in the Probate Court for the county of Franklin on June 4, 1917, by the administrator of the estate of Nelson St. John, late of Greenfield, for instructions, as stated in the opinion.

The Probate Court made a decree ordering that the fund of \$5,090 in question be paid to the legal representatives of Nelson St. John, without qualification, and not directly to his children, and that the widow was entitled to share in the distribution.

On appeal to the Supreme Judicial Court the case was heard by *Crosby, J.*, who made a decree affirming the decree of the Probate Court. The respondents other than the widow appealed.

F. J. Lawler, for the children of Caroline and Nelson St. John.

C. Fairhurst, (*W. A. Davenport* with him,) for Mildred M. St. John, widow of Nelson St. John.

RUGG, C. J. This is a petition brought by the administrator of the estate of Nelson St. John for instructions as to the disposition to be made of the sum of \$5,090, together with \$209.92 of accrued interest, now in his hands. The history of that sum of money is this: Caroline St. John, wife of Nelson, died testate in 1909. Her will was seasonably admitted to probate and its provisions were not waived by her husband. Its terms, so far as now material, were these: "I . . . give and bequeath all my property, both real and personal, to my husband Nelson St. Jean him to have and to hold full use of same during his lifetime, and after his death . . . he is to divide all such within named property equally between all our children still living after his death. . . . In case any or all of our children die previous to our departure from this world, then, the property or its value is to be left to their children in same proportions as though they themselves were to receive it; were they still living." A part of her estate was a farm in Fiskdale, a village in Sturbridge. After the allowance of the will, all the children of the testatrix in 1910 executed an agreement which, so far as now relevant, was in these words: "We hereby consent that our Father, Nelson St. John shall sell the

home place in said Fiskdale, owned and occupied by our Mother, and we are signing the requisite deeds and bill of sale to him so that he may pass a good title thereto to the purchasers, the price for the real and personal estate to be Nine Thousand Dollars, and out of said sum the following payments shall be made,—the mortgage held by the Southbridge Savings Bank of \$1200.,—the sum of \$600., to Frank N. St. John, the sum of Two Thousand Dollars to our said Father, Nelson St. John, and the necessary legal expenses of the proceedings, and the balance shall be received by Henry B. Montague, of Southbridge, in said County, the attorney in the proceeding, and by him deposited with the Springfield Safe Deposit & Trust Company of Springfield, Mass., under a trust agreement to be entered into between said Nelson St. John and said Trust Company, that said Trust Company shall hold the amount so paid over to them by said Montague in trust to pay said Nelson St. John the net income thereof semi-annually during his natural life and at his death to his legal representatives, provided that, if the children, or the legal representatives of any deceased child, shall all assent in writing, our said Father may terminate the trust as provided in the agreement with said Trust Company. This agreement is hereby expressly entered into by all the children and heirs of said Caroline St. John so that the sale of the home place may be made and the proceeds thereof disposed of as is herein provided.” The property was sold and the deed was signed by the father and all the children. The balance of the proceeds from this sale, after paying a mortgage and making other disbursements, amounting to \$5,090, was deposited with the Springfield Safe Deposit and Trust Company under an agreement of the tenor following: “This is to certify, that I, Nelson St. John, of the village of Fiskdale, in the Town of Sturbridge, in the County of Worcester and Commonwealth of Massachusetts, have this day, by the hands of Henry B. Montague, of Southbridge, deposited with the Springfield Safe Deposit & Trust Company, of Springfield, in said Commonwealth, the sum of Five thousand and Ninety (5090) Dollars, said amount to be held by said Trust Company and invested in its General Trust Fund and the net income arising therefrom to be paid to me semi-annually until my decease. Upon my death, the trust still continuing, said Trustees shall account for and pay over to my

legal representatives the principal of said fund with accrued interest then unpaid, freed from all trusts. It is expressly understood and agreed that during my life either party hereto may terminate this trust by giving to the other six months notice in writing of his or its intention so to do and upon the expiration of said period of six months said Trust Company shall account for and pay over to me, as below set forth, the principal of said fund with accrued interest then unpaid, freed from all trusts; provided however, that if I give the notice to terminate this trust, such notice must be assented to by all my living children, and by the proper legal representatives of any of my children then deceased. In the investment of said sum and management of this trust, said Trust Company shall be liable only for its wilful neglect or default and not for errors in judgment of its officers when acting in good faith." Nelson St. John, relict of the testatrix, and the trust company alone were parties to this agreement; it was not signed by any of the children. Sometime after this agreement and deposit, Nelson married Mildred Mary St. John, who survives as his widow, he having died intestate. By consent of all the children and the widow of Nelson the fund has been paid by the trust company to the petitioner. The question is, whether Mildred, the widow of Nelson, is entitled to share in the fund, or whether it ought to be paid wholly to the children of the testatrix.

It does not appear that any of these children died leaving issue before the death of the testatrix, or that any of them have died since her decease.

It has not been and could not well be contended that by the will the husband took anything more than a life estate. *Allen v. Hunt*, 213 Mass. 276. *Dallinger v. Merrill*, 224 Mass. 534, 540. *Homans v. Foster*, 232 Mass. 4. *Whitcomb v. Taylor*, 122 Mass. 243.

There is strong ground for argument that the will of the testatrix created a contingent rather than a vested remainder in the children of the testatrix. If one of the children had died after the mother and before the father, leaving issue who survived the father as life tenant, such issue doubtless would have shared in the remainder. *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35. *Welch v. Howard*, 227 Mass. 242. *Hall v. Peabody*,

232 Mass. 204. *White v. Underwood*, 215 Mass. 299. *Clarke v. Fay*, 205 Mass. 228, 231. If, however, it be assumed that the will created remainders vested in the children of the testatrix, the same result must be reached in the case at bar.

If the will had dealt with real estate alone, so far as this record discloses there would have been no occasion for the appointment of a trustee and no trust would have been created. But the will in terms included personal as well as real estate. The paper signed by the children of the testatrix specifically refers to "personal estate" and to a "bill of sale" as well as to "real . . . estate," "the home place" and "deeds," thus indicating plainly that the sum deposited in the trust company flowed in part from the sale of personal property. It is settled in this Commonwealth that, in the case of money or any personal property except specifically devised chattels, of which one person is given the use or income for life with remainder over, if no trustee is appointed, the executor is to hold it in trust and pay the income to the person entitled for life. *White v. Massachusetts Institute of Technology*, 171 Mass. 84, 96, and cases cited. In such cases a trust is necessarily implied. *Hooper v. Bradbury*, 133 Mass. 303, 307. *Rhines v. Wentworth*, 209 Mass. 585, 588.

When real estate is subject to a life estate and either to a vested or contingent remainder, there is provision by statute for sale and the appointment of a trustee to hold the proceeds. R. L. c. 127, §§ 28, 29, 31, as amended by St. 1917, c. 306. The parties in the case at bar without the intervention of a decree of the court converted the real estate into money and impressed it with a trust. *Lewis v. Shattuck*, 173 Mass. 486. They appear to have commingled the proceeds of the real and personal estate in a single fund. But, even if it came from the real estate alone, the inference is inevitable that the trust, with which it was impressed, was the same to which, if the terms of the statute had been followed, it ought to and would have been made subject.

The husband and children had no right to terminate such trust as to the personal property. We think that under the circumstances the same rule applies to the proceeds of the real estate. This is true even though the remainders had vested in the children. *A fortiori* they had no such right if the remainders created by the will were contingent. *Partridge v. Clary*, 228 Mass. 290. *Claf-*

lin v. Claflin, 149 Mass. 19. *Young v. Snow*, 167 Mass. 287. Beneficiaries may put themselves in a position where they may be estopped to question the termination of the trust. But the case at bar is not of that kind. So far as concerns the fund now in the hands of the petitioner, no controversy is raised as to the title to the real estate or as to the payments made out of the proceeds of its sale. The remainder of the proceeds are treated under the doctrine of equitable conversion as standing in the place of the real estate.

The children of the testatrix only undertook, so far as their agreement went, to have the money held by the trust company under a trust agreement, according to the terms of which the income was to be paid to their father during his life and "at his death to his legal representatives." This instrument was not, according to its terms, an attempt to terminate the trust. While not drawn with accuracy and fullness, that instrument contemplates the continuance of a trust in general conformity, so far as expressed, with the trust established by implication by the will of the testatrix respecting personal estate. That created a life estate in the surviving husband Nelson. The will also directed the husband "to divide all . . . property equally between our children still living after his death." Of course that provision could not be executed by the husband because it was to be executed only after his death. It naturally, if not necessarily, would be done by his personal representatives. The provision in the instrument signed by the children of the testatrix, to the effect that the money should be paid at the death of their father "to his legal representatives," did not purport to and did not have the effect of changing the terms of the trust. It was in conformity in substance to the terms of the will. It was at most a convenient method of administering the final distribution of the fund. It was analogous to the payment of appointed property to the personal representatives of a person exercising a power of appointment. See *Olney v. Balch*, 154 Mass. 318. The use of the words "legal representatives" in the instrument signed by the children and authorizing the payment of the trust fund by the trust company to the "legal representatives" of their father, cannot under these circumstances be construed as including a further agreement wholly by inference that the fund when so

paid over is to be distributed by such personal representatives among those entitled to the personal estate of their father under the laws of intestate succession or under his will, if he had died testate. The rational construction of that instrument is that the fund is to be paid by such legal representatives in accordance with the terms of the mother's will impressed upon both her personal and real estate and following both, including the latter, into this new form of investment.

The provision in the agreement between Nelson St. John and the trust company, that at his death the fund should be paid over to his legal representatives "freed from all trusts," does not affect the rights of the children of the testatrix. They did not sign that agreement. They were not parties to it and do not appear to have assented otherwise to its terms. The insertion of such a provision in the agreement by Nelson St. John was beyond the power conferred upon him by the agreement signed by his children, and he could not bind them in that particular.

Since no attempt was made to "terminate the trust as provided in the agreement with said trust company," the effect of that part of the agreement need not be considered.

It follows that, without deciding other questions raised by the children of Caroline St. John, the decree is to be reversed and a decree entered instructing the petitioner to divide the fund in his hands equally between all the children of Caroline and Nelson St. John living at the time of the death of the latter, in accordance with the will of Caroline St. John, and that Mildred Mary St. John, the widow of Nelson, is not entitled to share therein.

Decree accordingly.

WILLIAM H. MORRISSEY vs. CONNECTICUT VALLEY STREET
RAILWAY COMPANY.

Franklin. September 16, 1919. — October 9, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Rulings and instructions. *Evidence*, Presumptions and burden of proof, Of habits of intoxication, Of previous injuries, Opinion, Photographs.

In an action against a street railway company for injuries alleged to have been caused by the collision of an express car operated negligently by the servants of the defendant with a motor car driven by the plaintiff, where there was considerable evidence in regard to the conduct of the plaintiff and of the motorman in charge of the defendant's car immediately before and at the time of the collision, and the evidence as to the negligence of the plaintiff and of the defendant was conflicting, it was *held* that it was right for the presiding judge to refuse to make a ruling that the plaintiff was in the exercise of due care and that the defendant was negligent.

It usually cannot be ruled as matter of law that a burden of proof has been sustained.

A presiding judge properly may refuse to make a ruling singling out specific facts for special treatment.

In an action of tort for personal injuries evidence of the plaintiff's habits in the excessive use of intoxicating liquor may be relevant and admissible upon the issue of damages, where carefully confined to that issue by the presiding judge.

In an action of tort for personal injuries arising from a collision, the defendant may show that the injuries attributed by the plaintiff to the collision were in fact caused by other and previous accidents, and for this purpose evidence as to other previous injuries properly may be admitted.

In an action against a street railway company for injuries caused by the collision at night of a street railway car of the defendant with a motor car driven by the plaintiff, it was *held*, that the admission of testimony of the motorman who was operating the defendant's car at the time of the accident as to the distance at which his car could have been heard on the night of the collision could not be held to be harmfully erroneous.

The admission in evidence of photographs rests largely in the discretion of the presiding judge.

Where photographs have been admitted in evidence at a trial, and later the jury take a view of the scene shown by the photographs, this does not render the photographs incompetent.

TORT against a street railway company for personal injuries and damage to the plaintiff's motor car sustained on the evening of April 30, 1918, and alleged to have been caused by the negligence of the defendant's servants in the operation of an express

car of the defendant on Union Street in the village of South Deerfield, in the town of Deerfield, which ran into the motor car of the plaintiff when the plaintiff was driving it across the defendant's tracks on that street. Writ dated May 7, 1918.

In the Superior Court the case was tried before *Aiken*, C. J. At the close of the evidence the plaintiff asked for certain instructions. Those not given by the judge which were relied on in the plaintiff's brief were as follows:

"7. That the fact that the power of the car at the time of the accident was reversed in an attempt to stop the car, said car went a distance of from two hundred (200) to two hundred and fifty (250) or three hundred (300) feet beyond the point where the accident took place, then the jury have a right to consider whether the car was being driven at a high and dangerous rate of speed that it could not be stopped until it had gone the distance above referred to.

"8. That upon all the evidence there is no testimony to show that the plaintiff is not entitled to recover.

"9. That upon all the evidence there is no testimony to show that the plaintiff was in any degree negligent and that the evidence does show that the defendant, through its agents and servants, was negligent and careless in the operation of its car in its failure to sound the whistle giving warning of its approach and failure to have the headlight lighted and the further evidence that shows that the motorman was not keeping a look out ahead."

The other requests of the plaintiff for instructions are referred to in the opinion.

The Chief Justice submitted the case to the jury with full instructions. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, raising the questions which are described in the opinion.

The question asked the motorman there referred to was as follows: "Running over that track that night in question, in the way that car was running, how far off should you say a man could hear that car coming?" His answer, admitted subject to the plaintiff's exception, was as follows:

"Why, half or three quarters of a mile. It depends on what other noise there was going on; with conditions that night, half

a mile. Quite frequently the trolley-wheel makes a noise, which can be heard some distance. . . ."

F. J. Lawler, for the plaintiff.

W. A. Davenport, (*C. Fairhurst* with him,) for the defendant.

RUGG, C. J. This is an action of tort wherein the plaintiff seeks to recover damages sustained by him in person and property arising from a collision between an express car operated by the defendant upon its track and an automobile owned and operated by the plaintiff. The verdict was for the defendant and the case is here on the plaintiff's exceptions.

The plaintiff's requests for instructions were denied rightly. The eighth and ninth in substance required a ruling that the plaintiff was in the exercise of due care and that the defendant was negligent. These were both controverted issues, as to which there was conflicting evidence. There was a considerable body of testimony touching the conduct of the plaintiff and of the motorman in charge of the defendant's car immediately before and at the time of the collision. The jury may have disbelieved all that which tended to support the contentions of the plaintiff and credited only that which supported those of the defendant. *Commonwealth v. Russ*, 232 Mass. 58, 70. The case falls within the principle that it cannot usually be ruled as matter of law that a burden of proof has been sustained. *McDonough v. Metropolitan Life Ins. Co.* 228 Mass. 450, 452, 453. *Duggan v. Bay State Street Railway*, 230 Mass. 370. |

The subjects referred to in the first, second, third, fourth and fifth requests were adequately dealt with in the charge.

The sixth and seventh requests referred to specific facts which the judge was not required to single out for special treatment. *Ayers v. Ratshesky*, 213 Mass. 589, 593. The charge was ample and fair and not open in these respects to just criticism.

The several questions allowed to be put respecting the plaintiff's habits in the excessive use of intoxicating liquor were carefully confined by the judge to the issue of damages, in connection with which the testimony was relevant and admissible. *Ceresola v. Joseph F. Paul Co.* 224 Mass. 395.

Evidence was competent tending to show that the injuries which, according to the claims of the plaintiff, resulted from the collision in question, were in truth caused by other and previous

accidents sustained by him. As bearing upon this point, testimony as to other injuries received by the plaintiff was relevant. It is too plain for discussion that there is nothing inconsistent with this in decisions like *Wiemert v. Boston Elevated Railway*, 216 Mass. 598, and *Coleman v. New York, New Haven, & Hartford Railroad*, 106 Mass. 160.

The admission of the testimony of the motorman as to the distance at which his car could have been heard on the night in question, cannot be pronounced harmfully erroneous. *Ross v. John Hancock Mutual Life Ins. Co.* 222 Mass. 560, 562. *Harrington v. Boston Elevated Railway*, 229 Mass. 421, 427. The exclusion of somewhat similar evidence has been held not ground for sustaining exceptions in *Commonwealth v. Cooley*, 6 Gray, 350, and *Welch v. New York, New Haven, & Hartford Railroad*, 176 Mass. 393. Ordinarily it is better practice to develop the pertinent facts as to distance, intervening obstacles, nature of surrounding objects, and leave the inference to be drawn from the collective circumstances to the jury. But where much depends upon conditions more or less difficult to reproduce accurately by words, the conclusion of the witness, although involving something of opinion, is not necessarily incompetent. *Commonwealth v. Sturtivant*, 117 Mass. 122, 133. *Duddy's Case*, 219 Mass. 548. *Partridge v. Middlesex & Boston Street Railway*, 221 Mass. 273. *Eldridge v. Barton*, 232 Mass. 183.

The admission of the photographs in evidence cannot be pronounced erroneous. Such a matter rests largely in the discretion of the presiding judge. The fact that the jury later took a view of the scene shown by the photograph did not render it incompetent. *Field v. Gowdy*, 199 Mass. 568. *Halloran v. New York, New Haven, & Hartford Railroad*, 211 Mass. 132, 133. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 385.

There are no other exceptions which require discussion. The record has been examined carefully and no error is disclosed.

Exceptions overruled.

NELLIE J. LELAND *vs.* ORDER OF UNITED COMMERCIAL
TRAVELERS OF AMERICA.

SAME *vs.* SAME.

Hampden. September 23, 1919. — October 9, 1919.

Present RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Report by judge. *Rules of Court. Insurance, Accident. Proximate Cause.*

Rule 55 of the Superior Court (1915), providing that "Where a case is reserved for report, the counsel for the plaintiff shall present a draft report within twenty days thereafter, or within such further time as the court may by special order allow," does not, and was not intended to, deprive a trial judge of the power given him by R. L. c. 173, § 105, as amended by St. 1917, c. 345, to make a report in the exercise of his sound discretion in order to forward the ends of justice, and, where there has been a failure to comply with the rule, the judge is not precluded from making a report if in the exercise of wise discretion it ought to be made.

In an action on an accident insurance certificate, providing for indemnification "against the results of bodily injury . . . effected through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes" and not to be payable "unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of the death, disability or loss," on the evidence most favorable to the plaintiff it could be found that the insured tripped and fell twice and died on the evening of the same day, that before the fall he was suffering from a seriously diseased condition of the heart or lungs, or both, which was precipitated to a final termination by the fall, that such a fall would not have been fatal except for the diseased condition of vital organs and that the diseased condition and the fall operated together, each contributing to the fatal result. *Held*, that it could not be found that the death of the insured resulted from the accident "alone and independent of all other causes" as "the proximate, sole and only cause," and that under the terms of the contract the plaintiff could not recover.

CONTRACT, by the widow of Fred Adams Leland, late of Springfield, upon an accident insurance certificate issued by the defendant, a corporation organized under the laws of the State of Ohio, to the plaintiff's husband, in which the plaintiff was named as beneficiary, to recover for the death of the insured on January 17,

1916, alleged to have resulted from bodily injuries received on that day, "through external, violent and accidental means, which said injuries alone and independent of all other causes" occasioned his death. Writ dated June 13, 1916.

In the Superior Court the case was tried before *Callahan, J.* The evidence is described in the opinion. At the close of the evidence the judge ruled that the plaintiff was not entitled to recover and ordered a verdict for the defendant. By agreement of the parties the judge reported the case for determination by this court upon the stipulation that, if "the jury would have been warranted in finding a verdict for the plaintiff on the evidence admitted or offered by the plaintiff and improperly excluded, judgment was to be entered for the plaintiff in the sum of \$6,575 with interest from April 26, 1917; otherwise, judgment was to be entered upon the verdict."

The verdict was ordered and an order for reservation by report was made on April 26, 1917. On July 27, 1917, the plaintiff made the motion for extending the time "for filing her exceptions," which is mentioned in the opinion. This was allowed as there stated, the judge intending to extend the time for presenting a report. Afterwards at numerous times the plaintiff made successive motions to extend the time for filing her exceptions and presenting a report, which were allowed by the judge. On July 23, 1918, the defendant made a motion that judgment be entered on the verdict "Because the plaintiff has failed duly to present a draft report within the time required by law and by the rules of this court." Another reason alleged was that the plaintiff had failed to file her exceptions.

The judge denied the motion, and in finally reporting the case made the following statement: "In addition to and independent of any rights that the plaintiff may now have to insist upon the case being reported, I am, of my own volition, and in the exercise of my discretion, and because I believe that justice requires it, now reporting this case to the Supreme Judicial Court."

The defendant alleged exceptions.

Rule 55 of the Superior Court (1915) is as follows: "Where a case is reserved for report, the counsel for the plaintiff shall present a draft report within twenty days thereafter, or within such further time as the court may by special order allow."

A. Dunnett of Vermont, (*J. P. Carr* with him,) for the plaintiff in the first case.

J. P. Carr, (*A. Dunnett* of Vermont with him,) for the plaintiff in the second case.

D. B. Hoar, (*E. A. McClintock & R. D. Houlihan* with him,) for the defendant.

RUGG, C. J. During the trial of this case the presiding judge suggested that he would order a verdict for the defendant and that the case be reported upon a stipulation as to its final disposition in accordance with the ultimate decision as to the questions of law. At the conclusion of the evidence a verdict was ordered for the defendant and the parties agreed that the case should be reported to this court upon terms stated. No exceptions were saved on this point. Thereafter the plaintiff presented a motion for extending the time for "filing her exceptions," which was allowed by the judge, without close examination, on the assumption that it was a motion to extend the time for filing a report. No correction of the record has been made in order to make it conform to the intention of the court. See *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 387; *Maggelet's Case*, 228 Mass. 57, 63; *Farris v. St. Paul's Baptist Church*, 220 Mass. 356, 359; *Perkins v. Perkins*, 225 Mass. 392. The defendant contends that under Rule 55 of the 1915 Superior Court rules the report is not rightly before us, because the time within which the report might have been filed had expired before it actually was filed, relying in this connection on *Hack v. Nason*, 190 Mass. 346.

This contention cannot be supported. The Superior Court apart from rule has power under R. L. c. 173, § 105, as amended by St. 1917, c. 345, to report cases as therein specified without special limit as to time. *Strong v. Carver Cotton Gin Co.* 202 Mass. 209, 212. *Lee v. Blodget*, 214 Mass. 374. Rule 55 was not intended to deprive the judge of this power to make a report in the exercise of sound discretion in order to forward the ends of justice. Its purport is to put upon a plaintiff a definite duty in regard to the preparation of reports and to confine his absolute rights within the rational limits there established, to the end that unreasonable delay may be prevented. See *Frank, petitioner*, 213 Mass. 194. The rule was not designed to tie the hands of the judge so that he cannot do what justice requires as between

the parties in cases where grave and doubtful questions of law are involved. Its words do not require such a result. The judge may well, where there has been failure to comply with the rule, decline to exercise his discretion to report a case. But he is not thereby precluded from making a report if in the exercise of wise discretion it ought to be made. The case is before us rightly.

This is an action of contract brought by the beneficiary on an accident insurance certificate issued by the defendant. The contract, amongst other stipulations, provided for indemnification, to the extent there specified, to the insured or beneficiary "against the results of bodily injury . . . effected through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes." Another provision was to the effect that the benefits should not be payable by the defendant "unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of the death, disability or loss."

The insured was a commercial traveler and continued his work regularly until the Saturday before his death. He was apparently in good health, and had been for many years, save a recent cold. On Monday morning he tripped and fell twice, once becoming unconscious, as he was returning to his chamber from the cellar of his home where he had done something about the heater. He was assisted to bed, regained consciousness, complained of pain in his right side, was treated by a physician, had difficulty in breathing, and died that same evening. Slight abrasions observed on the body apparently are conceded to have resulted from the fall and not in themselves to have been a cause of the death. An autopsy was had, which revealed abnormal and unnatural conditions in the form of heart lesions, lung lesions, and lesions of other parts of the circulatory system. It was plainly evident that these conditions had relation to the death and alone were sufficient to cause death, and that some of them had existed for a considerable period, probably more than a year. A part of the heart was normal and the right part "very markedly, clearly and regularly dilated all the way around." This condition was so bad that, if it were in existence before the fall, the deceased

could not have been expected to have lived very long. A diseased condition of the lungs also was disclosed. The physicians whose testimony was most favorable to the plaintiff gave as their opinion that the death resulted from a sudden call for more effort than the heart could make, or from acute heart failure at the time of the fall, and that the shock of the fall precipitated death, because an individual with a heart damaged to the extent of that of the deceased is disposed to acute failure or lack of working power from a shock or over exertion of any kind.

There is testimony of one of the experts which appears, standing by itself alone, to have been somewhat equivocal in respect of the dilated condition of the heart and to be susceptible of the construction that that condition might have resulted, and perhaps in his opinion did result, from the fall and did not antedate the fall. This witness testified that "the cause of death, medically speaking, was myocardial insufficiency and acute dilation. Myocardial insufficiency is such a relation between the condition of the heart muscle and the tasks which it is called upon to do that it is unable to do them." This witness also gave evidence to the effect that "some of the lesions of the heart and lungs without doubt had existed before" the time of the fall and he thought "might have existed for more than a year probably, . . . were probably constantly progressing." He testified in considerable detail to a diseased condition in both lungs of the deceased known as "emphysema," the result of which was "an excessive demand made directly on the right side of the heart," the side excessively dilated, and gave it as his opinion that the deceased was suffering at the time of and for some time previous to the fall from chronic emphysema. Further questions and answers were as follows: "Isn't it true that the most that can be possibly claimed in this case with reference to that fall, or either or both of the two falls alluded to, is that they aggravated and made fatal an already existing chronic disease?" The answer was "Yes." In substance but in slightly varying form this question and answer were repeated. Then in answer to the question, "You don't want the jury or the court to understand your testimony as being any stronger than that?" the witness replied, "No, I don't." If it can be contended that the earlier testimony of the witness was open to different constructions and was more or less conflicting or

inconsistent, these questions and answers were clear and not open to doubt. The replies were definitely adhered to by the witness as constituting the truth, and he and the jury, so far as they gave his testimony credence, were bound by them as his final expression of view. *Sullivan v. Boston Elevated Railway*, 224 Mass. 405, and cases collected at page 406.

The other witness most favorable in his evidence to the plaintiff testified that the deceased for a long time before the fall was suffering from serious and progressive diseases of both the heart and the lungs, and that the extreme extent of claim that rightly could be made was that the accident aggravated and made fatal already existing diseases, and that disease and fall acted concurrently to cause death.

The plaintiff's case must rest upon this testimony as its basis. Without reciting the evidence in further detail, it is plain from a careful examination of it all that the utmost which could have been found in favor of the plaintiff was that the deceased was suffering at the time of and before the fall from a seriously diseased condition of the heart or lungs, or both, which was precipitated to a fatal termination by the fall, but which probably would not have terminated thus on that day but for the fall. Such a fall as the deceased suffered would not have been fatal except for the diseased condition of vital organs. These two causes, namely the diseased condition and the fall, operated together, each contributing to the fatal result.

The principle of law, which is controlling under such a contract as that here relied upon, in the light of such facts as are disclosed on this record, was declared in *Freeman v. Mercantile Mutual Accident Association*, 156 Mass. 351, in an opinion by Mr. Justice Knowlton. That principle is, "Where different forces and conditions concur in producing a result, it is often difficult to determine which is properly to be considered the cause, and, in dealing with such cases, the maxim, *Causa proxima non remota spectatur*, is applied. But this does not mean that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under consideration is a natural and probable consequence, in view of the existing

circumstances and conditions. The law does not consider the cause of causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so, as well when death comes through the medium of a disease directly induced by the injury, as when the injury immediately interrupts the vital processes." That statement of the law has been widely quoted and that decision cited with approval by courts of other jurisdictions and is generally accepted as sound. *Stanton v. Travelers Ins. Co.* 83 Conn. 708, 711. *White v. Standard Life & Accident Ins. Co.* 95 Minn. 77, 80. *Fetter v. Fidelity & Casualty Co.* 174 Mo. 256, 267, 268. *Modern Woodman Accident Association v. Shryock*, 54 Neb. 250, 259. *Penn v. Standard Life & Accident Ins. Co.* 158 N. C. 29, 34. *National Masonic Accident Association of Des Moines v. Shryock*, 20 C. C. A. 3, 5. *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 62. *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 98. To the same effect see *Thornton v. Travelers Ins. Co.* 116 Ga. 121; *Maryland Casualty Co. v. Morrow*, 130 C. C. A. 179; S. C. 213 Fed. Rep. 599; *Vernon v. Iowa State Traveling Men's Association*, 158 Iowa, 597, 605, 606; *Aetna Life Ins. Co. v. Bethel*, 140 Ky. 609. See in this connection, *Moon v. Order of United Commercial Travelers of America*, 96 Neb. 65.

The application of that principle of law to the case at bar is that, if the insured was suffering from a disease, which was accelerated and aggravated by the accident so as to be a cause co-operating with it to produce the fatal end, then there can be no recovery. Manifestly recovery is not barred merely because the insured is suffering from disease. One upon a bed of illness may meet death by an explosion or other accidental means. *Bohaker v. Travelers Ins. Co.* 215 Mass. 32. If there is no active disease, but merely a frail general condition, so that powers of resistance are easily overcome, or merely a tendency to disease which is started up and made operative, whereby death results, then there may be recovery even though the accident would not have caused

that effect upon a healthy person in a normal state. *Cheswell v. Fraternal Accident Association of America*, 199 Mass. 267. *Collins v. Casualty Co. of America*, 224 Mass. 327.

The inevitable result is that under this statement of the law the plaintiff cannot recover upon these facts. The deceased confessedly was suffering from disease or diseases which actively co-operated with the fall in causing death. The disease and the fall were concurring, efficient and proximate causes in producing the death. Either alone without the other would not then have resulted fatally. It cannot be held with any due regard to the meaning of words in the contract here sued upon, that the death of the insured resulted from the accident "alone and independent of all other causes" as "the proximate, sole and only cause." See in this connection, *Leahy v. Standard Oil Co. of New York*, 224 Mass. 352, 360-363.

The burden of proof is upon the plaintiff to show that the death resulted from one or more of the causes enumerated by the terms of the contract as establishing the liability of the defendant. *Smith v. Travelers Ins. Co.* 219 Mass. 147, 150. As matter of law she has failed to sustain that burden for the reasons stated. It becomes unnecessary to consider the other questions raised.

Exceptions overruled.

Judgment on the verdict.

GEORGE L. TUPPER vs. EDWIN G. BARRETT (afterwards FLORENCE G. BARRETT, administratrix).

Worcester. September 29, 1919. — October 9, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Sales of Merchandise in Bulk. Words, "Merchandise."

In an action against a deputy sheriff for an alleged conversion of five tip carts, one show wagon and six sets of double harnesses, it appeared that the property in question had been attached by the defendant after it had been sold and transferred by a bill of sale to the plaintiff, and that in the sale to the plaintiff the requirements of St. 1903, c. 415, in regard to the sale of merchandise in bulk had not been complied with. The seller of the property testified that, while his principal business was trading, buying and selling horses, he sometimes bought horses and carriages; that he "would buy an entire team and sell it.

Sold tip carts and harnesses — anything that was lawful." It could have been found that previous to the sale to the plaintiff the seller had sold in the ordinary course of trade articles of the nature of those in question, that when the sale to the plaintiff was made the seller had formed the intention of selling his entire stock of merchandise and that the sale to the plaintiff was in pursuance of that intention and was a sale in bulk of a part of the stock of merchandise, not in the ordinary course of trade, and therefore was voidable by the attaching creditor. The trial judge found for the defendant. *Held*, that the finding was warranted.

In the case above described it was *held* that the property sold to the plaintiff could be found to be "merchandise" within the meaning of St. 1903, c. 415.

TORT against a deputy sheriff for the alleged conversion of certain articles of personal property enumerated in the opinion. Writ dated May 12, 1914.

On June 4, 1917, the defendant died and on motion of the plaintiff the administratrix of his estate was cited into court to defend the action. The case was tried before *O'Connell, J.*, without a jury. The evidence is described in the opinion.

The plaintiff asked for seven rulings. The judge made the third ruling requested, which was as follows:

"3. St. 1903, c. 415, entitled 'An Act to prohibit sales of merchandise in bulk in fraud of creditors' applies only to mercantile stock, goods, wares and merchandise kept for sale."

The plaintiff's other requests for rulings were as follows:

"1. The sale of the goods enumerated in the bill of sale from Dumas to Tupper, dated April 2, 1914, passed title to the goods and was not a sale in avoidance of St. 1903, c. 415, entitled 'An Act to prohibit sales of merchandise in bulk in fraud of creditors.'

"2. The sale of the goods enumerated in the bill of sale from Dumas to Tupper, dated April 2, 1914, passed title to the goods and the transaction was not one of the sale in bulk of any part or the whole of a stock of merchandise as provided by St. 1903, c. 415, as the articles so sold were not merchandise which the seller kept for sale in the usual course of his business."

"4. The five wagons, six dump carts, six sets of harnesses and one show wagon, sold by Dumas to the plaintiff, as stated in the bill of sale, were used by Dumas in the course of trucking jobs obtained by him and were used by him in the exercising of and working of horses which he was in the business of selling, and therefore were not goods, wares and merchandise within the meaning of St. 1903, c. 415.

"5. The articles with the exception of the horse enumerated in the bill of sale from Dumas to Tupper were not goods, wares and merchandise within the meaning of St. 1903, c. 415, but were fixtures used by him and incidental to the business of selling horses conducted by Dumas.

"6. The attachment of the goods as the property of Dumas, with notice to the defendant that the same were claimed by and owned by and were the property of the plaintiff, constituted conversion by the officer.

"7. The defendant, after being notified that the goods he was about to attach were owned and claimed by the plaintiff, by attaching the articles converted the same and acted at his peril."

The judge refused to make any of these rulings, and made, with others, the findings quoted in the opinion. He found for the defendant; and the plaintiff alleged exceptions.

The advertisement published by Dumas, referred to in the opinion as admitted in evidence subject to the plaintiff's exception, was headed "Announcement" and began with the statement, "I have sold out the entire stock, stables and good-will of the business to Mr. Geo. L. Tupper. Next week will be bargain week. Some fine horses going."

The case was submitted on briefs.

A. H. Bullock & J. M. Thayer, for the plaintiff.

J. W. Mawbey & H. W. Bowker, for the defendant.

CROSBY, J. This is an action of tort brought for the alleged conversion of five tip carts, one show wagon and six sets of double harnesses. The defendant having died since the date of the writ, Florence G. Barrett, the administratrix of his estate, has been summoned to defend the action. The case was tried before a judge of the Superior Court without a jury, who made certain findings of fact and found for the defendant.

On May 11, 1914, the articles in question were attached by the defendant, a deputy sheriff, on a writ in which C. W. Bowker and Company, a corporation, was named as plaintiff and George H. Dumas was defendant; the property was afterwards sold on an execution which issued on a judgment in favor of the plaintiff in that action.

The plaintiff claims title to the property by virtue of a sale to him by Dumas as evidenced by a bill of sale dated April 2, 1914.

The trial judge made the following and other findings of fact:

"I find that said Dumas maintained a stable on Foster Street in Worcester, and that he sold horses, wagons and harnesses, and also did some transient livery business, and that at the time of said sale he used some of his horses, wagons, carts and harnesses in doing a certain excavating job.

"I find that the sale of the five dump carts, one wagon and six sets of double harnesses mentioned in the plaintiff's declaration was a sale in bulk of a part of the stock of merchandise of said Dumas.

"I find that at the time of said sale Dumas was indebted to said C. W. Bowker and Company to an amount exceeding \$500 and that he also had other creditors at the same time.

"I find that the sale was not made in the ordinary course of trade and in the regular and usual prosecution of the seller's business."

The judge also found that no inventory was made and no notice given to the seller's creditors as provided for by St. 1903, c. 415. It is conceded by the plaintiff that the provisions of the statute referred to were not complied with, it being his contention that the sale in question was not a sale of "merchandise" as that word is used in the statute, and that the articles so sold were in the nature of fixtures which the seller used in the usual course of his business. In other words, the plaintiff claims that the sale to him by Dumas was not within the provisions of the statute.

The word "merchandise" is a word of large signification and has been held to be synonymous with tangible property which could be sold. *New England & Savannah Steamship Co. v. Commonwealth*, 195 Mass. 385, 390. In this connection see *Tisdale v. Harris*, 20 Pick. 9, 13; *Burgess v. Alliance Ins. Co.* 10 Allen, 221; *Tobey v. Kip*, 214 Mass. 477.

We are of opinion that the word "merchandise" as used in the statute in question may be found to include the property which was sold to the plaintiff, especially in view of what was sought to be accomplished by the act, which, as was stated by Chief Justice Knowlton, in *John P. Squire & Co. v. Tellier*, 185 Mass. 18, at page 19, "was to provide for creditors protection against a class of sales which are frequently fraudulent, and

which leave creditors with no means of collecting that which they ought to receive."

Dumas testified that while his principal business was trading, buying and selling horses, he sometimes bought horses and carriages; that he "would buy an entire team and sell it. Sold tip carts and harnesses — anything that was lawful." Upon this evidence and the other evidence recited in the record, the judge could have found that, previously to the sale to the plaintiff, Dumas had sold in the ordinary course of trade in the regular and usual prosecution of his business, articles of the nature of those in question; it also could have been found that when the sale to the plaintiff was made Dumas had formed the intention of selling his entire stock of merchandise, and that the sale to the plaintiff was in pursuance of that intention and was a "sale in bulk" of a part of a stock of merchandise, rather than in the ordinary course of trade in the regular and usual prosecution of the seller's business, and was therefore voidable by the attaching plaintiff, a creditor of the seller. *Hart v. Brierley*, 189 Mass. 598, 601. *Gallus v. Elmer*, 193 Mass. 106. *Adams v. Young*, 200 Mass. 588. *Rabalsky v. Levenson*, 221 Mass. 289. *Mills v. Sullivan*, 222 Mass. 587.

The rulings requested by the plaintiff (except the third which was made) were rightly refused.

The exception to the admission of the advertisement cannot be sustained; it was competent to show the nature of the sale to the plaintiff, and could have been found to have been ordered published by him, or at least with his knowledge and consent.

We find no error of law in the findings and rulings made, or the refusals to rule.

Exceptions overruled.

L. HAZEL GILBERT vs. WIRE GOODS COMPANY.

Worcester. September 29, 1919. — October 9, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Employer's liability. Workmen's Compensation Act, Employee's claim of common law rights. Words, "Employee."

In an action at common law for personal injuries sustained while in the employ of the defendant, it appeared that the plaintiff entered the defendant's employ in 1910 and that on July 1, 1912, the defendant became a subscriber under the workmen's compensation act and posted printed notices in form and substance as required by St. 1911, c. 751, Part IV, §§ 20, 21, in the manner approved by the Industrial Accident Board and in accordance with the rule of that board on the subject, that the notices remained in position up to and including the date of the plaintiff's injuries, that, when the defendant became a subscriber, the plaintiff was a minor, that neither the plaintiff nor her parent ever read the notices or had any knowledge of their contents or was served with notice that the defendant was a subscriber under the act otherwise than by the notices so posted, and that no notice in writing claiming the plaintiff's common law rights ever was given by the plaintiff or her parent to the defendant. St. 1911, c. 751, Part I, § 5, provides that, if the contract of hire was made before the employer became a subscriber, the employee shall be held to have waived his right of action at common law to recover damages for personal injuries, if he shall not have given his employer notice in writing that he claimed such right within thirty days of notice of such subscription. *Held*, that the plaintiff by failing to give the notice required by § 5 had waived her right of action at common law, although she had had no knowledge of the fact that the defendant was a subscriber.

Under the title and provisions of the workmen's compensation act (St. 1911, c. 751, as amended) and the definition of "Employee" contained in Part V, § 2, of the act, a minor employee is within the provisions of the act and is bound by its terms.

The provision contained in Part II, § 14, of the workmen's compensation act that, "If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege," does not deprive a minor of his rights under the act or of the power to exercise them himself.

TORT at common law for personal injuries sustained on July 5, 1916, while in the employ of the defendant. Writ dated September 7, 1916.

In the Superior Court the case was submitted to *N.P. Brown, J.*, upon an agreed statement of facts, and no question in refer-

ence to the pleadings was raised by either party. The material facts are stated in the opinion. The judge by agreement of counsel ordered a verdict for the defendant, subject to the plaintiff's exception, and reported the case for determination by this court, with a stipulation that, if there was error in directing a verdict for the defendant, judgment was to be entered for the plaintiff in the sum of \$800; otherwise, judgment was to be entered for the defendant.

F. W. Morrison, for the plaintiff.

C. C. Milton, (*F. L. Riley* with him,) for the defendant.

CROSBY, J. This is an action of tort at common law to recover for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant. A judge of the Superior Court directed a verdict for the defendant and reported the case to this court.

The plaintiff entered the employ of the defendant in August, 1910, and continued in such employ until the date of her injury, July 5, 1916. She was born on October 10, 1891. The defendant became a subscriber under the workmen's compensation act on July 1, 1912, and continued as such up to and including the date of the plaintiff's injury. On July 1, 1912, it posted printed notices, in form and substance as required by St. 1911, c. 751, Part IV, §§ 20, 21, and in the manner approved by the Industrial Accident Board and in accordance with Rule I adopted by the board to take effect on July 1, 1912, at the principal entrance to the factory through which the plaintiff passed in going to and from her work, in the corner of the room where she was employed, and in each room where employees worked; and they remained in position up to and including the date of the plaintiff's injuries. *Pecott's Case*, 223 Mass. 546, 549. Neither the plaintiff nor her parent as her natural guardian ever read the notices or had knowledge of their contents or was served with notice that the defendant was a subscriber under the act otherwise than by the notices so posted, and neither the plaintiff nor her parent ever expressly in writing or orally waived her common law rights, and no notice in writing claiming such rights was ever given by either of them to the defendant.

In *Young v. Duncan*, 218 Mass. 346, it was held that under Part I, § 5, the employee is held to have waived his common law

rights if he fails to give notice "at the time of his contract of hire," and that this provision of the statute is not dependent upon any other condition or circumstance and "is not made to rest upon knowledge or notice to him of the fact that the employer is a subscriber."

As the plaintiff entered the defendant's employ before it became a subscriber, the question to be decided is not the same as that presented in *Young v. Duncan, supra*. Section 5 provides that, if the contract of hire was made before the employer became a subscriber, the employee shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given such notice within thirty days of notice of such subscription.

We are of opinion that the construction put upon § 5 by this court in *Young v. Duncan, supra*, applies in principle to employees whose contract of hire began before the employer became a subscriber, and that in either case it is plain that the employee waives his common law rights to recover for personal injuries unless he gives his employer the required notice.

It was said in *Young v. Duncan, supra*, at page 352, with reference to § 5, Part I, "It simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manifesting a desire to elect a different status." See *King v. Viscoloid Co.* 219 Mass. 420.

The remaining question is, Do the provisions of the workmen's compensation act apply to an employee who is a minor? The word "employee" as used in the act is defined in Part V, § 2, as amended as follows:

"'Employee' shall include every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. . . ."

The title to the act and its provisions in general show that it relates to payments to "employees" for personal injuries. The definition does not in terms exclude minors, but on the contrary includes "every person in the service of another under any contract of hire," with the exception of certain persons specifically

described. Children and minors are expressly recognized in Part II, § 7 (c), as amended by St. 1914, c. 708, § 3. Under Part II, § 22, as amended by St. 1914, c. 708, § 8, the Industrial Accident Board is authorized in its discretion to provide for the payment of a lump sum to a minor who has received permanently disabling injuries. See also St. 1915, c. 236.

If a minor is not within the terms of the act and therefore not bound by them, it would follow that the insurer would be relieved from making payments thereunder to a minor employee if the contract of hire was made before he became of full age. To reach such a conclusion would result in great hardship. It would not be in accord with the language of the act or in harmony with its humanitarian purposes which were to cure the defects of previously existing remedies and to provide adequate and just protection to employees against injuries, and relief in case of accidents.

Part II, § 14, provides that, "If an injured employee is mentally incompetent or is a minor at the time when any right or privilege accrues to him under this act, his guardian or next friend may in his behalf claim and exercise such right or privilege." This section does not deprive a minor of his rights under the act; it simply authorizes his guardian or next friend to exercise similar rights and privileges in his behalf.

In accordance with the terms of the report, judgment is to be entered for the defendant.

So ordered.

DANIEL S. DOUGLAS vs. HOLYOKE MACHINE COMPANY.

Worcester. September 29, 1919. — October 9, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Evidence, Admitted without objection, Competency. *Agency*, Scope of employment. *Negligence*, Object thrown from building.

In an action against a machine company for personal injuries caused by the plaintiff being struck by an iron washer thrown from a window of the defendant's building by a machinist in the defendant's employ, there was evidence that after the accident the man who threw the washer said to the plaintiff,

"Excuse me, it is an accident. . . . It got away from me" and that "he didn't consider himself to blame for it." No objection was made to the testimony. *Held*, that the testimony was incompetent as against the defendant, such a statement not being within the scope of the authority of the machinist who made it, but that, having been admitted without objection, it should be given its probative force.

In the same case it was *held* that the statements above described were no evidence that the throwing of the washer was a part of the defendant's business or that the defendant was negligent.

In the case above described there was nothing in the record to show that the machinist who threw the washer made, or was required to make, any use of the washers in the course of his employment. The general manager of the defendant testified that there were damaged and worn-out washers in the shop and that these were put into the scrap, that he could not tell whether sometimes employees threw them out of the window. There was no evidence tending to show that any washer ever had been thrown into the street before or that this was a customary disposition of them by the employees of the defendant or that the washer that hit the plaintiff was broken, disused or worn, or that the machinist in the course of his employment had anything to do with washers, and the most that could be found in favor of the plaintiff was that the washer that injured the plaintiff came out of a window of the defendant's building by the act of one of its employees, without any indication that this was done in furtherance of the defendant's business. *Held*, that a verdict ought to have been ordered for the defendant.

TORT for personal injuries sustained by the plaintiff at about two o'clock in the afternoon of August 31, 1916, when the plaintiff was walking on the sidewalk of Thomas Street, a public way in Worcester, by reason of being hit by an iron washer that came through a window of the adjoining building occupied by the defendant. Writ dated January 18, 1917.

In the Superior Court the case was tried before *Fox, J.* The evidence is described in the opinion. At the close of the evidence the defendant filed a motion that the judge order a verdict for the defendant. The judge denied the motion and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$135. The defendant alleged exceptions.

E. G. Norman, for the defendant.

P. T. Dolan, for the plaintiff.

Rugg, C. J. This is an action of tort, wherein the plaintiff seeks to recover compensation for personal injuries sustained by him while travelling upon Thomas Street, a public way in Worcester, from being hit by an iron washer which came through a window of a building nearby occupied by the defendant. The decisive question is whether there was any evidence to warrant

a finding that the washer came through the window by reason of any act of negligence for which the defendant was responsible.

There was testimony that the plaintiff did not see the washer until it hit him, when he saw it on the sidewalk. He then turned, looked into the window, and saw one Williamson within the building four or five feet from an upright drill; that he had some talk with Williamson, who said, "Excuse me, it is an accident. . . . It got away from me. . . . He [Williamson] said it was an accident and he didn't consider himself to blame for it." In substance this testimony as to the conversation was repeated in the examination of Williamson himself. Such testimony was incompetent as against the defendant, the making of statements of that nature plainly not being within the scope of the authority of Williamson, *McNicholas v. New England Telephone & Telegraph Co.* 196 Mass. 138, 142, *Hathaway v. Congregation Ohab Shalom*, 216 Mass. 539, 544; but having been admitted without objection, it was entitled to its probative force. *Hubbard v. Allyn*, 200 Mass. 166, 171. There is no indication in this statement, however, that this act occurred as a part of the master's business, or that it was negligent.

The testimony of Williamson, who was a witness at the trial, was to the effect that he threw the washer to attract the attention of a friend, who was passing on the opposite side of the street, and not for any purpose of his employment. The judge rightly instructed the jury that, if they believed his testimony, they must find for the defendant. But since they might have disbelieved this testimony, or that part of it favorable to the defendant, *Commonwealth v. Russ*, 232 Mass. 58, 70, the case must be considered in its other aspects most favorable to the plaintiff. Williamson was a machinist in the employ of the defendant. His work at the time in question was on a drill. He was standing at a bench where the tools were and "where all the washers were. . . . The washers were on a nail on the wall." The only testimony as to the use made of the washers was to the effect that they were bolted to the drill table. There is nothing in the record to show that Williamson, in the course of his employment made, or was required to make, any use of the washers. The general manager of the defendant testified amongst other matters that there were damaged and worn-out washers in the shop, and that these were

put into the scrap; that he could not tell whether sometimes employees of the defendant threw them out the window; that he did not care if they did so long as he was not hit; that he supposed sometimes they threw things out of the window and that he would not discharge an employee "for anything like that." There was no evidence tending to show that any washer had actually ever been thrown into the street before, or that that was a customary disposition of them by the employees of the defendant, or that the one which hit the plaintiff was broken, disused or worn, or that Williamson in the course of his employment had anything to do with washers.

The rule of law governing the responsibility of a master for the act of his servant has been stated frequently. The master is liable for an injury done to a third person by the servant acting within the scope of his employment, for the purpose of executing his orders and doing his work, but not when the servant, disregarding either momentarily or for a longer period the object of his employment and not pursuing his duty as employee, executes a design of his own. If the act of the servant is performed in the course of doing his master's work, in carrying out the master's directions, or in accomplishing his master's business, then the latter will be answerable whether the wrong be merely negligent, or wanton and reckless. *Howe v. Newmarch*, 12 Allen, 49. *Levi v. Brooks*, 121 Mass. 501. *Robinson v. Doe*, 224 Mass. 319.

The responsibility of common carriers to their passengers for acts of their servants in the course of their employment is more stringent. That rests, however, upon the high degree of care and diligence imposed upon common carriers with respect to those whom they undertake to transport. *Hayne v. Union Street Railway*, 189 Mass. 551. *Jackson v. Old Colony Street Railway*, 206 Mass. 477. A different rule obtains in some other cases where the plaintiff and the defendant are under contractual relations to each other and the tort, for which action is brought, is founded on a breach of contract. *Vannah v. Hart Private Hospital*, 228 Mass. 132. The plaintiff and the defendant in the case at bar were strangers to each other and their respective rights and liabilities depend upon the law of torts wholly unaffected by any contract.

Guided by these principles, we are unable to discover in this record evidence of negligence for which the defendant is liable.

The most that could have been found is that the washer which injured the plaintiff came out of the window of the defendant's building by the act of one of its employees, without any indication whatever that this was an act done in furtherance of the defendant's business.

The case falls within the class illustrated by *Bowler v. O'Connell*, 162 Mass. 319, *Brown v. Boston Ice Co.* 178 Mass. 108, *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, *Fairbanks v. Boston Storage Warehouse Co.* 189 Mass. 419, *Berry v. Boston Elevated Railway*, 188 Mass. 536, *Saxe v. Walworth Manuf. Co.* 191 Mass. 338, *Lamanna v. American Express Co.* 230 Mass. 564, *Gunning v. King*, 229 Mass. 177, and like decisions. It is distinguishable from *Hankinson v. Lynn Gas & Electric Co.* 175 Mass. 271, where there was ample evidence that the custom of the employee of the defendant, inferably well known to and sanctioned by it, was to drop or toss disused pieces of carbon into the street.

The request of the defendant that a verdict be directed in its favor ought to have been granted. In accordance with the terms of the report, let the entry be

Judgment for the defendant.

WRIGHT ECKERT'S CASE.

Berkshire. September 9, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Workmen's Compensation Act, Independent contractor.

In a claim under the workmen's compensation act against a town, that had accepted St. 1913, c. 807, and was insured under the act, where the claimant at the time of his injury was hauling a load of ashes for the town to be used in the construction of a public way, it appeared that by the claimant's contract of employment he was to furnish the team and to feed, take care of and drive the horses for a fixed daily remuneration, that the entire management and mode of transportation were under his control and that the only orders given by the foreman of the town were to direct him where to go for the ashes and, after the ashes had been loaded by the town's employees, to dump them at a designated place. *Held*, that the claimant was an independent contractor and not an employee of the town and could not be awarded compensation.

APPEAL to the Superior Court under the workmen's compensation act from a decision of the Industrial Accident Board dismissing the claim of Wright Eckert against the town of Lee for compensation for an injury sustained on July 22, 1918, when he was driving his team and was hauling a load of ashes for the town.

The case was heard by *Morton, J.* The facts shown by the evidence reported are described in the opinion. St. 1913, c. 807, was not mentioned in the record but it was found that the town of Lee was "insured to pay compensation to its employees." The judge made a decree that the claimant was not entitled to compensation and that his claim for compensation be dismissed. The claimant appealed.

J. M. Rosenthal, for the claimant.

G. Gleason, for the insurer.

BRALEY, J. The undisputed facts shown by the record and found by the Industrial Accident Board are that at the time of the injury the claimant with his team was hauling a load of ashes for the town of Lee to be used in the construction of a public way. It was provided by his contract of employment that he should furnish the team, feed, take care of and drive the horses for a fixed daily remuneration. The entire management and mode of transportation were under his control and the only orders given by the town's foreman were to direct him where to go for the ashes and after the ashes had been loaded, in which work he took no part, to dump the ashes at a designated place. It is plain as matter of law under *McAllister's Case*, 229 Mass. 193, *Centrello's Case*, 232 Mass. 456, and *Winslow's Case*, 232 Mass. 458, that when injured he was not an employee of the town but an independent contractor.

It having been rightly held and ruled by the board that there could be no recovery under St. 1911, c. 751, and amendatory acts, the decree dismissing his claim for compensation must be affirmed.

Ordered accordingly.

ROBERT B. KEMPTON & another vs. JAMES H. BOYLE & others.

Hampden. September 10, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & CARROLL, JJ.

Equity Jurisdiction, To redeem from mortgage.

In a suit in equity by a second mortgagee of real estate to redeem the real estate from a first construction mortgage, it appeared that the first mortgagee was to advance an agreed sum of money in instalments, and that, after a schedule of payments had been prepared and before the first mortgage and the construction loan agreement had been executed, the mortgagor orally agreed with the first mortgagee, in consideration of his promise to make the loan, with the risk attendant thereon, and of certain services to be performed by him in connection with the loan, to pay him a bonus of an agreed amount. The oral agreement for the bonus was not mentioned in the construction loan agreement in writing and was not known to the second mortgagee when he took his mortgage. One half of the bonus was to be deducted from the first advance by the first mortgagee and the other half from the third advance. There was no agreement, express or implied, that any part of the bonus should be remitted if the building was not completed or if the full amount specified in the schedule was not advanced. The first mortgagee performed his agreement in regard to services. After the third advance the mortgagor abandoned work on the building. *Held*, that the bonus was not a mere gratuity but that the contract for its payment was a valid one and that, in order to redeem the property, the plaintiff must pay to the first mortgagee the amount of the bonus in addition to the amount of money advanced by the first mortgagee.

BILL IN EQUITY, filed in the Superior Court on December 15, 1917, by the holders of two junior mortgages respectively on two parcels of real estate in Springfield against James H. Boyle, the holder of prior construction mortgages thereon, and Henry Tremblay and Octave Vaillancourt, the mortgagors, to redeem the property from the prior mortgages and for an accounting.

The case was referred to a master, who filed a report containing, with other findings, the findings of the facts that are stated in the opinion. Later the case was heard by King, J., who found the facts to be as set forth in the master's report and made an interlocutory decree confirming the master's report so far as the findings of fact were concerned. But the judge, deeming it no part of the master's duty under the rule to him to pass upon the ques-

tion of law whether the plaintiffs in order to redeem the premises described in the bill from the mortgages therein mentioned should be required to pay the defendant Boyle the several sums described as bonuses for loans and amounting to \$900 besides interest, which sums were charged by the defendant Boyle to the defendants Tremblay and Vaillancourt but were not paid to them as a part of Boyle's mortgage loans to said defendants, the master's ruling in that regard was not confirmed.

At the request of the parties the judge upon the pleadings and the facts found by the master as set forth in his report reserved and reported the case and all questions of law arising therefrom for determination by this court.

The case was submitted on briefs.

J. H. Jones, for the plaintiffs.

J. F. Jennings & W. P. Jennings, for the defendant Boyle.

DE COURCY, J. The plaintiffs hold a junior mortgage on each of two lots of land in Springfield, and seek from the defendant Boyle, owner of prior construction mortgages, an accounting in order to determine the amount required for redemption. The mortgagors, Tremblay and Vaillancourt, partially erected a building on the lot at the corner of Plainfield and Rowland streets, but abandoned the work on September 2, 1917, when the house was ready for roofing. They then had received from the first mortgagee, Boyle, a payment of \$400 on July 27, 1917, \$400 on August 17 and \$500 on September 1. Boyle, however, took from them a receipt acknowledging the payment of \$700 on the first and \$800 on the last of these dates; the extra \$600 being for an alleged bonus. On the second lot the mortgagors did no work except excavation and the construction of the cellar wall. On July 27, 1917, Boyle paid them \$400, under his construction mortgage on this lot, and took a receipt for \$700, the extra \$300 being on account of a bonus of \$600 which he was to receive.

On the facts found by the master it is not now denied that Boyle is legally entitled to interest on each \$6,000 note from its date to September 1, 1917; and on the instalment payments from that date to the time of redemption. *Tripp v. Babcock*, 195 Mass. 1. The only question raised by the plaintiffs (aside from that of costs) is whether they are required to pay the

\$900 charged as bonuses, in order to redeem from the first mortgages.

On the findings of the master, we must accept the following facts as established: The plaintiff Kempton, representing himself and his co-plaintiff, was present at the signing of all the papers; and a copy of each of the construction loan agreements was delivered to him. The defendant Boyle declined to embody in the agreements any provision limiting payments to eighty per cent of the cost of the labor and materials incorporated into the buildings, or one requiring the approval of the plaintiffs to all payments. There was no express mention of "bonus" in the agreements. The finding of the master is, that, after a schedule of payments had been prepared and before the instruments were executed, "the mortgagors agreed with the defendant, in consideration of his promise to make the loans, with the risk attendant thereon, and to perform the services which it was expected and understood should be rendered by him in connection with the progress of the undertakings, to pay him \$600 on each loan as a bonus. It was also then agreed between them that half of this bonus should be deducted from the first payment made on each mortgage and the same amount from the third payment." He further finds that "the defendant [Boyle] visited the property very frequently, and no claim was made that he had not rendered whatever services were due the mortgagors under his agreement with them, or that he had not performed the duties incumbent on him as the holder of the construction loan mortgages." Further, that "there was no agreement, express or implied, that any part of the bonus should be remitted if the buildings were not completed, or if the full amount specified in the schedule was not advanced, or the entire third payment was not required to be made." According to these findings the bonuses were not mere gratuities, but valid contracts, and the consideration therefor was fully performed by the defendant Boyle. It seems a hard bargain, especially in view of the express provision in each of the construction contracts, that the mortgagors and those claiming title under them "agree to pay interest at the times and rate named in said mortgage note on the whole sum agreed to be advanced from the date of said note in any event, . . . notwithstanding the fact that all of said monies are not advanced forthwith." But in

accordance with their voluntary agreement, the mortgagors undoubtedly would be required to pay these bonuses, if they were the parties seeking to redeem.

As already stated, the written agreements contained no reference to a bonus, and the plaintiff Kempton was not informed of the oral agreement providing for such payment at the time when it was made. The master reports: "He testified, however, that he became aware of it previous to the time of the third advancement, and there was no evidence that he then questioned its validity or propriety. He objected, however, to the deduction of the bonus on the last payment when he learned it had been made, which was after the discontinuance of the work. The defendant never told the plaintiff he was taking receipts for larger amounts than were actually advanced, but no false statements were made by him in reference thereto. . . . There was no evidence warranting an inference that the defendant did not act throughout the transaction in good faith."

On these findings the case is governed by *Tripp v. Babcock, supra*. In that case, on a bill for accounting by the second mortgagee, it was held that the holder of the construction mortgage was entitled to charge a payment of \$247, due to the mortgagee in an outside transaction, which the mortgagor orally had agreed should be secured by the mortgage. It is as true in this case as in that, that if the construction mortgagee, Boyle, had actually advanced to the mortgagors \$900 more than he did, and they had then paid Boyle that sum for the "bonuses," either out of the money so advanced or from other resources, "the result would have been the same; but the plaintiff could have made no complaint. The plaintiff has lost nothing by having that done directly which might have been done indirectly."

We are constrained to decide that the defendant is legally entitled to interest on \$12,000 from the date of the notes until September 1, 1917, the date of the third advance, to the \$1,700 actually advanced, and \$57.75 paid for insurance with interest on both from September 1, 1917, to the time of redemption, and to the \$900 "bonus," without interest. No costs are to be allowed.

Decree accordingly.

INHABITANTS OF AMHERST vs. FLORENCE V. GATES.

Hampshire. September 16, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Equitable Restrictions.

A deed of a lot of land to four grantees contained the following provision: "Said land is not to be enclosed farther west than the present fence, at the west end, which is a few feet west of the east side of said M's house, unless by consent of said M, and no building is ever to be erected on any part of said premises hereby conveyed, nor otherwise placed on said land, or any part thereof, meaning to have said premises kept as an open park for the benefit of said Grantees." It was found "that the restriction imposed was valuable to the respective lands of all the parties to the deed and that it was the intent of the grantor and grantees to benefit their respective lands thereby, and as a matter of law such restriction at the time imposed was appurtenant to the lands of all the parties to the deed and was forever." *Held*, that the reference to M did not affect the restriction that followed it; and that the equitable restriction prohibiting the erection of a building on the land and requiring the land to be kept as an open park for the benefit of the grantees continued to exist not only for the benefit of the land of the grantees but also for that of the adjoining lands of the grantor and became appurtenant to any parts into which those lands might be divided.

PETITION, filed in the Superior Court on April 15, 1916, by the town of Amherst, alleging that the petitioner had taken certain land on Main Street in that town for the purposes of a public library, that the respondent, Florence V. Gates, had some interest in the land, and that the parties had been unable to agree as to the amount of damage she had sustained by such taking; and praying that the amount of her damage, if any, might be determined by a jury in the manner provided by law.

The case was submitted to *Sisk, J.*, upon an agreed statement of facts. The record of a suit in equity brought on May 29, 1911, by the petitioner and others against the respondent to restrain her from building a house on the land, including a master's report, was made a part of the agreed statement of facts. This also contained a statement of the contentions of the respective parties, a statement that the parties waived a trial by jury and the following stipulation:

"It is agreed by the parties that if the court shall find, as a matter of law, that said part of the respondent's land, admitted by her to be subject to building restrictions, is also encumbered and subject to 'park rights,' as contended for by the petitioner, the finding of the court shall be for said Florence V. Gates, respondent, for the sum of thirty-five hundred dollars (\$3,500) with interest from the date of the taking, March 31, 1916, and costs.

"If on the contrary, the court shall find as a matter of law, that said part, so admitted by said respondent to be subject to building restrictions, is not encumbered and subject to 'park rights,' as contended for by the petitioner town, then in that case the finding of the court shall be for said Florence V. Gates, respondent, for the sum of fifty-two hundred and fifty dollars (\$5,250) with interest from the date of the taking, March 31, 1916, and costs."

The material facts are stated in the opinion. The judge reported the case for determination by this court, concluding his report as follows: "Upon the foregoing statement of facts signed by counsel I find that said restricted part of the respondent's land was not encumbered and subject to 'park rights,' as contended for by the petitioner, and I find for the respondent Gates against the petitioner town in the sum of \$5,250 and interest thereon from March 31, 1916. And costs. And at the request of the parties I report the case to the Supreme Judicial Court for final determination on said agreement of the parties."

J. C. Hammond, for the petitioner.

D. H. Keedy, for the respondent.

BRALEY, J. The respondent, either by grant, devise or inheritance, holds title to the land described in the petition, which has been taken in fee by the town for the site of a public library, under the deed of Martin Thayer to David Mack, Jr., Luke Sweetser, Jonathan B. Condit and Edward Dickinson, dated May 10, 1836, the material part of which reads as follows: "A certain piece of land lying in said Amherst between Boltwood's Hotel and said Mack's dwelling house called the Triangle lot and situated between the old and new roads and bounded on all sides by the highway, containing one acre and eight rods, more or less, and being the same which I purchased of George Montague and others and conveyed to me by them by their deed bearing

date on the 9th day of January A. D. 1836. Said land is not to be enclosed farther west than the present fence, at the west end, which is a few feet west of the east side of said Montague's house, unless by consent of said Montague, and no building is ever to be erected on any part of said premises hereby conveyed, nor otherwise placed on said land, or any part thereof, meaning to have said premises kept as an open park for the benefit of said Grantees."

It is settled that this restriction is an equitable servitude or easement passing with the conveyance of the premises to the original grantees and all those who subsequently claim under them in whole or in part. *Sprague v. Kimball*, 213 Mass. 380, 382. *Riley v. Barron*, 227 Mass. 325. The reference to the grantor's immediate predecessor in title neither enlarges nor restricts the grant. It is only for the purpose of identification of the premises and the limitation as to further fencing without his consent.

The question before us under the agreed statement of facts on which the case is submitted is the measure of damages, the amount of which is made dependent on the nature and extent of the restriction. The petitioner contends that the restriction is not only a prohibition against building, but there is "a further and additional easement . . . to have said premises kept as 'an open park' . . . , and that this right to an 'open park' enured to all persons who at the time of the taking in this case were living on and holding title to any of the lands remaining in" the common grantor at the date of the original deed as well as those claiming under Edward Dickinson and Luke Sweetser, to whose title the town which also owns land formerly a part of Thayer's remaining lands, has conditionally succeeded. The respondent while conceding that she cannot enclose the land nor erect or place any building thereon, claims that it "was not subject to an easement consisting of the right to enter upon it and to resort thereto for rest, enjoyment and recreation; that is, that it was not subject to 'park rights' in the sense contended for by the petitioner." The words are, to be "kept as an open park for the benefit of said Grantees." It is obvious that there are no words of dedication to the public, nor does the context warrant such construction by implication. The agreed facts also are silent as to any oral state-

ment of the grantor or of any one authorized to act in his behalf that he intended to provide a park for the benefit of the public, or of any acts by him as a landowner from which such intention fairly can be inferred. We are unable to say that the land in question has ever been set apart and dedicated to the public use. *Attorney General v. Onset Bay Grove Association*, 221 Mass. 342. It also becomes unnecessary to discuss the question whether the restriction can be construed as intended to cover the grantor's adjoining lands. See *Clapp v. Wilder*, 176 Mass. 332; *Lipsky v. Heller*, 199 Mass. 310, 317.

The parties have incorporated in the agreed facts the record in a suit in equity brought by the petitioner and other interested parties against this respondent in which the scope of the restriction and her right to build on the land was in controversy. The master's report, upon which a final decree unappealed from was entered, contains these findings and ruling: "At the time of the conveyance of the original Triangle lot from Thayer to Condit, Sweetser, Dickinson and Mack, I find that the restriction imposed was valuable to the respective lands of all the parties to the deed and that it was the intent of the grantor and grantees to benefit their respective lands thereby, and as a matter of law such restriction at the time imposed was appurtenant to the lands of all the parties to the deed and was forever." It therefore must be held that not only the land of the grantees but the remaining or adjoining lands of the grantor were, and continued to be within the protection of the restriction. *Butrick, petitioner*, 185 Mass. 107, 113. *Barnes v. Huntley*, 188 Mass. 274. *C. A. Briggs Co. v. National Wafer Co.* 215 Mass. 100, 108, 109. While the restriction, as we have said, attached and became appurtenant not only to the estate of the several grantees but to any part or portion into which those estates might be divided, the record contains no reference to any act of the grantor or of the grantees or of any person claiming under them showing or tending to show any entry upon the land for the purposes of recreation, or of its improvement or beautification. We are left to the bare wording of the instrument and the circumstances existing at the date of the deed. The space undoubtedly was to be kept open furnishing light, air and prospect to the surrounding lands of the grantor and the grantees, and no limitation is placed

upon the right of those upon whom such right is conferred to resort to the land for recreation and enjoyment in so far as its physical condition permitted.

We are accordingly of opinion that, the land being subject to such rights, the respondent under the agreement of the parties is entitled to judgment "in the sum of thirty-five hundred dollars with interest from March 31, 1916, and for her costs."

So ordered.

ASHMAN T. GRAVES & another vs. HELEN M. APT.

Franklin. September 16, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Bond, To secure release from arrest. *Contract*, In writing. *Evidence*, Extrinsic affecting writings. *Practice*, Civil, Ordering verdict. *Words*, "Avoid."

A bond given by a defendant arrested on mesne process to secure his release from arrest, which was not good as a statutory bond under R. L. c. 169, § 2, but was executed voluntarily by the defendant and was accepted at least impliedly by the plaintiff, was *held* to be valid as a contract at common law.

In an action against the surety on the common law bond mentioned above, it appeared that the condition of the bond was that the defendant released from arrest "shall appear before the Justices of the said Court to be holden as aforesaid and answer to the plaintiff in said action and shall not avoid." The defendant surety offered to show that, before signing the bond, she said in substance that she did not in any way desire to make herself liable for the judgment. The trial judge excluded the evidence. *Held*, that the exclusion was right, as the defendant surety could not thus control or vary the obligation of the contract in writing.

In the same case it was *held*, that, assuming that the words "shall not avoid" were of doubtful meaning, the circumstances under which the contract was executed and the facts to which it related could be considered in order to apply this language in accordance with the intention of the parties, such facts in the present case being before the court and undisputed.

In the same case it was *held* that by the proper construction of the words "shall not avoid" in the condition of the bond quoted above the surety was bound to have her principal in court when judgment should be obtained and execution issued against him, so that execution might be levied upon him.

At a trial where the facts are not in dispute the presiding judge properly may order a verdict for the plaintiff upon a ruling of law.

CONTRACT against the surety on a bond given to secure the release from arrest on mesne process of Allan W. Allcutt in an

action of tort in the Superior Court brought against him by the plaintiffs for the conversion of a carload of apples, in which action the plaintiffs recovered judgment in the sum of \$1,029.02 and costs, for which execution issued and was returned unsatisfied. Writ dated August 9, 1917.

In the Superior Court the present action was tried before *Jenney, J.* The bond sued upon was signed by Allan W. Allcutt as principal and Helen M. Apt as surety. It was dated November 9, 1915. The penalty was \$1,500. The recital and condition were as follows:

"The condition of this obligation is such that whereas the said Allcutt has been arrested on mesne process in an action of tort, wherein Ashman T. Graves and Wilson A. Graves are plaintiffs and the said Allan W. Allcutt is the defendant the writ in which action is dated November the eighth A. D. 1915 and returnable before the justices of the Superior Court next to be holden at Greenfield in said County of Franklin on the first Monday of December next.

"Now therefor if the said Allan W. Allcutt shall appear before the Justices of the said Court to be holden as aforesaid and answer to the plaintiff in said action and shall not avoid then this obligation shall be void otherwise it shall remain in full force and virtue."

The exclusion of the evidence offered by the defendant to show what she said before signing the bond as surety is described in the opinion. At the close of the evidence the defendant made a motion in writing that a verdict be ordered for the defendant. The judge denied the motion. The defendant also asked the judge to make the following rulings, besides another which was made by the judge:

"1. That upon all the evidence the plaintiffs are not entitled to a finding.

"2. That the condition in the bond signed by the defendant does not make her liable for the amount of the judgment in the case of *Graves et al. vs. Allcutt*.

"3. That the defendant Allcutt having appeared and defended the case, in which he was defendant, in which the bond was given, the defendant Apt was released from any and all liability on account of said bond."

The judge refused to make any of these rulings, and instructed

the jury that on the evidence in the case there had been an avoidance, and ordered a verdict for the plaintiff in the penal sum of the bond, \$1,500. The defendant alleged exceptions.

F. J. Lawler, for the defendant.

W. A. Davenport, (*C. Fairhurst* with him,) for the plaintiffs.

DE COURCY, J. One Allan W. Allcutt was arrested on mesne process in an action of tort brought by the present plaintiffs. He secured his release by giving a bond, on which this defendant was a surety. Judgment was recovered against Allcutt in the sum of \$1,029.02, but the execution issued thereon was returned "unsatisfied," the officer's return showing that he was unable to find Allcutt or any property belonging to him. This action is brought against the surety on the bond to recover the amount of said judgment.

Admittedly the bond is not a good statutory bond, as it does not comply with the requirements of R. L. c. 169, § 2. But as it was voluntarily executed by the defendant, and at least impliedly accepted by the plaintiffs, it is a valid bond at common law, on the principle stated in *Bank of Brighton v. Smith*, 5 Allen, 413, "that although the instrument may not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law." *Bell v. Pierce*, 146 Mass. 58.

The condition of the bond is that Allcutt "shall appear before the Justices of the said Court to be holden as aforesaid and answer to the plaintiff in said action and shall not avoid." In determining the obligation of the defendant on this instrument we must, of course, be governed by the ordinary and reasonable meaning of the language the parties employed. The trial judge rightly excluded the proffered testimony that Mrs. Apt before signing the bond, said in substance that she did not in any way desire to make herself liable for the judgment. She could not thus control or vary the obligation of the written contract, which was intended to be the complete and final record of all the terms agreed upon. Assuming that the clause "shall not avoid" is of doubtful meaning, the circumstances in which the contract was executed

and the facts to which it related properly could be considered, in order to apply this language in accordance with the intention of the parties; and these facts were all before the court and undisputed. *Strong v. Carver Cotton Gin Co.* 197 Mass. 53, 59, and cases cited. *Warner v. Brown*, 231 Mass. 333.

The obligation of the defendant called for something more than the presence of Allcutt at the trial of the original action. That requirement was explicitly provided for by the language "shall appear . . . and answer." On the other hand, it well may be that the parties did not use the words "shall not avoid" as equivalent to "shall . . . abide the final judgment of the court;" both of which clauses appear in the usual statutory bond provided for by R. L. c. 169, § 2. But we think a reasonable construction of the language is, that it obligated the surety to have her principal in court when judgment should be obtained and execution issued against him. The very object of the parties in executing the bond was to give the plaintiffs a substitute for the body of Allcutt, who was then held under arrest on mesne process. An accepted definition of "avoid" is "to evade or escape." 6 C. J. 874. Apparently the word is used in that sense in § 7 of the statute, which provides, "In case of the avoidance of the principal and a return on the execution that he has not been found, . . . his bail shall satisfy the judgment." The early statute, St. 1784, c. 10, § 2, reads: "when the principal shall avoid, so that his goods, lands, or chattels cannot be found to satisfy the execution, nor his body found to be taken therewith, the person for whom judgment was given, shall be entitled to his writ of *scire facias* from the same court against the bail." See also 1 Prov. St. 1693-4, c. 1. Indeed to construe the words "shall not avoid" as not covering the failure of the debtor to appear so that execution may be levied upon him would be to defeat the obvious purpose of the bond in question and render it ineffective.

There was no error in the refusal to give the rulings requested by the defendant; nor in directing a verdict for the plaintiff, as the facts were not in dispute.

Exceptions overruled.

EDGAR C. CLARK vs. EDMUND W. JONES.

Hampden. September 21, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Contract, Consideration. Limitations, Statute of.

The settlement before entry of an action for a debt barred by the statute of limitations is a good consideration for a note and mortgage, the debt having existed at the time of the settlement although the remedy for it was extinguished.

BILL IN EQUITY, filed in the Superior Court on May 5, 1919, to enjoin the foreclosure of a mortgage purporting to have been made by the plaintiff and for its cancellation.

The case was referred to a master, who filed a report containing the findings that are stated in the opinion. Later the case was heard upon the master's report by *King, J.*, who made a final decree that the bill be dismissed with costs to be paid by the plaintiff to the defendant. The plaintiff appealed.

The case was submitted on briefs.

C. L. Young, for the plaintiff.

E. Hutchings, for the defendant.

BRALEY, J. The master finds that, the defendant having brought an action against the plaintiff as maker on certain overdue promissory notes, the parties entered into negotiations for a settlement, and shortly before the return day the plaintiff executed "a note for fourteen hundred and twenty-two dollars," payment of which was secured by mortgage. It is further found that the note and mortgage were executed and duly delivered upon the consideration that the original note or notes were thereby paid and satisfied and the pending action settled.

While the master also states that when the action was begun six years had elapsed since the cause of action accrued and therefore the action had been barred under R. L. c. 202, § 2, it is plain that the mortgage note cannot be attacked for want of consideration as alleged in the bill. The remedy indeed had perished, but the debt not having been satisfied, the moral obligation to

pay it afforded a sufficient consideration for the debtor's promise in writing signed by him with the unequivocal intention of liquidating the balance remaining on the old notes, as well as to avoid the expense and uncertainty of the litigation. *Little v. Blunt*, 9 Pick. 488. *Chace v. Trafford*, 116 Mass. 529. *Shepherd v. Thompson*, 122 U. S. 231. R. L. c. 202, § 12. *Custy v. Donlan*, 159 Mass. 245, 247. The compromise and settlement moreover furnished a sufficient consideration independently of the payment by the new note of the original indebtedness. *Kennedy v. Welch*, 196 Mass. 592, 596, and cases there collated.

The note and mortgage being valid, the trial court properly refused to enjoin the foreclosure of the mortgage for breach of condition, or to order its cancellation for invalidity as prayed for, and the decree dismissing the bill should be affirmed with costs.

Ordered accordingly.



THOMAS E. KING vs. CITY OF SPRINGFIELD.

SAME vs. SAME.

SAME vs. SAME.

Hampden. September 22, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Damages, For property taken or impaired by statutory authority. *Way*, Public. *Contract*, Construction. *Interest*.

Owners of land abutting on a certain street in a city or included in a proposed new street made an offer in writing to the city that, if an order should be passed by the city council and should become effective by a certain date authorizing and directing a contemplated widening and laying out, "they will accept in full of damages for their land and buildings taken or injuriously affected thereby the amounts set opposite their respective names." The time for passing the order was extended by the landowners and within the extended time the order was passed and the way was widened, laid out and completed. An order was passed by the city appropriating for the benefit of the landowners the amounts named in the offer in acceptance thereof. One of the landowners contended that he was entitled to interest on the amount awarded from the date of entry upon his land. Interest was not mentioned in the offer. *Held*, that the agreements contained in the offer accepted by the acts of the city were valid, and that the landowners, having agreed to accept the sums named "in full of damages," were entitled to no interest.

THREE PETITIONS, filed in the Superior Court on February 23, 1918, by Thomas E. King against the city of Springfield, for damages caused by the taking of certain parcels of real estate belonging to the petitioner in that city for the laying out of a new street and the alteration by widening of Dwight Street.

The cases were heard together by *Aiken*, C. J. The material facts are stated in the opinion. At the close of the evidence the Chief Justice in the first case ordered a verdict for the petitioner in the sum of \$75,974.70, and in the second and third cases ordered one verdict for both cases in the sum of \$150,370, these being the amounts named in the memoranda in writing containing the offers described in the opinion, without interest. At the request of the petitioner the Chief Justice reported the cases for determination of the effect of the various instruments annexed to the record upon the question of interest. If they constituted "a valid agreement between the parties which the respondent might enforce or rely upon as a limitation of the damages," judgment was to be entered on the verdicts; otherwise, there was to be added to the verdicts interest from August 27, 1917, or from such date as the court might determine.

The cases were submitted on briefs.

H. W. Ely & J. B. Ely, for the petitioner.

E. T. Broadhurst & H. P. Small, for the respondent.

DE COURCY, J. These three petitions were brought for the assessment of damages caused by the taking of the petitioner's land for highway purposes. Verdicts were rendered therein by order of the court, after an agreement of the parties; and the cases are reported to this court on the question whether the petitioner is entitled to interest, and if he is, from what date.

Before the contemplated improvements were undertaken by the city, the petitioner and other owners of land abutting on Dwight Street or included within the lines of a proposed new street, delivered to the city certain memoranda in writing, whereby they offered to accept specified amounts "in full of damages," if an order should be passed by the city council and become effective on or before December 30, 1916, properly authorizing and directing such laying out and widening. The proposals also contained agreements relative to the assessment of betterments, and other provisions which need not be recited. Later the

petitioner and others extended to December 1, 1918, the time within which the offers might be accepted by the city. Admittedly the way has been altered, widened and completed in accordance with the terms of the order of the city council. On November 25, 1918, an order was duly passed by the city appropriating the sums of \$75,974.70 and \$150,370 for the benefit of the petitioner and in acceptance of his offers; and directing the payment thereof.

The petitioner contends that he is entitled to interest on the amounts awarded from August 27, 1917, the date of entry upon the land. *Edmands v. Boston*, 108 Mass. 535, 551. That depends upon the validity and construction of his said offers to accept definite sums as damages. His argument that the transaction between him and the city was not a taking by eminent domain, but a voluntary purchase, and hence invalid by force of St. 1915, c. 263, § 1, is disposed of by the recent case of *Nevins v. City Council of Springfield*, 227 Mass. 538, in which these proceedings relative to the widening of Dwight Street were under consideration. As was said by Knowlton, C. J., in *Aspinwall v. Boston* 191 Mass. 441, 445, "a unilateral contract, offering to the city favorable terms as to land damages as an inducement to the laying out of a street, may be considered by the board charged with the duty of dealing with such matters, and may be accepted and made binding, by performance of that which is referred to in it as its consideration." His claim that the betterment clause in the agreements was *ultra vires* is not applicable to the issues in the present cases, which relate to damages caused by the laying out of the street. See *Nevins v. City Council of Springfield*, 227 Mass. 538, 543.

The agreements in question are valid, and the city has fully performed its part. Entry was duly made, and the construction of the street was completed in accordance with the order of the city council. On November 25, 1918, which was within the period allowed by the extension agreement of July 28, 1917, the city specifically appropriated for the benefit of this petitioner the amounts named in his offer, and in acceptance of the same. This was a compliance with the express terms of the agreement in question, and superseded the earlier order of the city council, on October 28, which was conditional on the release of all rights

that any mortgagee or lessee might have in the damages. Finally, as matter of construction, the agreements do not provide for the payment of interest, in addition to the amounts stated in the offer. The signers, including this petitioner, agreed that "they will accept in full of damages for their land and buildings taken or injuriously affected thereby the amounts set opposite their respective names." The meaning of this language is clear. And as there was, in our opinion, "a valid agreement between the parties which the respondent might enforce or rely upon as a limitation of damages," judgment must be entered, on the verdicts by the express terms of the report.

So ordered.

PATRICK H. QUINN vs. MAYOR AND ALDERMEN OF SPRINGFIELD & others.

Hampden. September 23, 1919. — October 10, 1919.

Present: RUGG, C. J., BRALEY, DE COURCY, & CROSBY, JJ.

Way, Public: assessment for betterments. *Tax*, Assessment for betterments. *Words*, "Alteration."

On a petition by the owner of land abutting upon a certain street in a city for a writ of certiorari to quash an assessment for betterments for the widening of the street for about nine tenths of its length to a certain point and the laying out of a new street from that point leading from the street as widened to another street, it appeared that the petitioner's land abutted on the widened part of the pre-existing street and did not abut on the new street, and the petitioner contended that the assessment was illegal and void because it combined the widening of the pre-existing street and the laying out of the new street as the basis of assessment. The order of the city council, on which the assessment for betterments by the board of aldermen was based, included the widening of the pre-existing street and the laying out of the new street and had been held to be valid by a previous decision of this court. *Held*, that the order of the city council, correctly construed, amounted to an "alteration" of the pre-existing street as that word is used in R. L. c. 48, § 1, and in R. L. c. 50, § 1, as amended, relating to betterments, and that the order and the work done under it, including the widening of the pre-existing street and the laying out of the new street, constituted a single improvement and authorized the board of aldermen to assess betterments on the lands specifically benefited based upon the entire cost of the improvement as a whole. Accordingly the petition was dismissed.

PETITION, filed on February 4, 1919, by the owner of real estate abutting on Dwight Street in Springfield for a writ of certiorari

addressed to the mayor and board of aldermen of Springfield directing them to certify their proceedings in reference to certain assessments for betterments upon the real estate of the petitioner, as described in the opinion, in order that such proceedings might be quashed.

The case came on to be heard before *De Courcy*, J., who at the request of the parties reserved it upon the petition, the answer and an agreed statement of facts for determination by the full court.

J. B. Ely, for the petitioner.

E. T. Broadhurst, (*H. P. Small* with him,) for the respondents.

CROSBY, J. This is a petition for a writ of certiorari to quash an assessment for betterments, received from the widening of Dwight Street and the laying out of a new street from Dwight Street, as widened at Sanford Street, to State Street. The case is reserved upon the pleadings and an agreed statement of facts. The order of the city council under which the work in question was accomplished became effective December 29, 1916. It provided for the taking of certain lands by eminent domain in accordance with special statutes relating to Springfield, St. 1852, c. 94, § 14, St. 1873, c. 126, § 6, and the general law St. 1904, c. 443. The changes made under the order consisted of widening Dwight Street on the easterly side between Lyman Street and Harrison Avenue, and on the westerly side between Harrison Avenue and Sanford Street, and of laying out a new street from Dwight Street, as widened at Sanford Street, to State Street at a point opposite Willow Street. The order provided that the "laying out, altering, widening and grading be made and done under the provisions of law authorizing the assessments of betterments." The validity of the order was upheld by this court in *Nevins v. City Council of Springfield*, 227 Mass. 538.

The order, upon which the assessment for betterments to the land of the petitioner and other landowners was made, was passed by the board of aldermen and became effective December 23, 1918. The petitioner's land abuts on that part of Dwight Street that was widened and does not abut on the new street laid out from Sanford Street to State Street. The land assessed for betterments under the order includes all the land abutting on Dwight Street. The petitioner's land is assessed for \$5,753 as one half the special benefit determined to have been received by it.

In the city of Springfield the board of aldermen are the officers authorized by law to assess betterments arising from the laying out and alteration of streets and ways. St. 1866, c. 174. St. 1867, c. 94. St. 1871, c. 382. R. L. c. 50, § 1. St. 1917, c. 344, Part III, §§ 1, 9. R. L. c. 8, § 5, cl. 10. St. 1852, c. 94.

The sole question presented by the record is, whether the assessment of betterments to the land of the petitioner is valid, it being his contention that the action of the board of aldermen in combining the cost of both the widening of Dwight Street and the laying out of the new street as the basis of assessment was illegal and void. In determining this question, it is important to consider what was provided for by the order of the city council and what was actually accomplished thereunder.

Dwight Street is a thoroughfare running in a northerly and southerly direction through the business section of the city from Lyman Street to State Street, and is nearly parallel with, and the next street easterly of, Main Street, the most extensively travelled highway in the city.

The original order cannot be held to be void because it included the widening of Dwight Street and the laying out of a new street from Dwight Street to State Street. The validity of that order was sustained by the decision in *Nevins v. City Council of Springfield*, *supra*. The entire improvement was embodied in a single order. It provided for the widening of Dwight Street for nearly its entire course, and by deflecting it for the remainder of its course without discontinuing the unwidened portion of the street, and at its southerly end making it a forked street, the new portion thereof abutting on State Street directly opposite Willow Street, which runs southerly from State Street. Two entrances from Dwight Street into State Street were thereby provided, one by means of the new street, the other by that portion of Dwight Street which remained and which had not been discontinued or widened. The length of the new street is about two hundred and fifty feet, and the entire length of Dwight Street through either of the branches at the southerly end is about twenty-four hundred feet. It appears from the plans which are attached to the agreed statement of facts that, with Dwight Street widened as provided in the order, without constructing the new street from Sanford Street to State Street, Dwight Street would have been about one

hundred and seventy-five feet wide at Sanford Street, while its only connection with State Street would have been through that part which was not widened and is only fifty feet in width. It is also apparent from the plans that the laying out and construction of the new street, without the widening of Dwight Street, would have resulted in the laying out of a street seventy feet wide and about two hundred and fifty feet long, ending at Sanford Street, which is less than fifty feet wide. The total cost including the damages awarded by the city council in the order of December 29, 1916, to the owners of land taken for the new street will amount to not less than \$339,370.62; the damages awarded for the widening of Dwight Street from Lyman Street to Sanford Street, together with the cost of construction, will amount to not less than \$1,234,676.23, as appears by the agreed statement of facts.

The determination of the city council that public convenience and necessity required that the changes be made, and that they be accomplished in the form in which they were prescribed in a single order, would seem to indicate that the whole improvement was considered as a unit and that those assessed should be charged with a share of the total expense. The only rational inference to be drawn from the order of the city council is, that the members thereof would not have determined that public convenience and necessity required either the widening of Dwight Street or the laying out of the new street, in view of all the circumstances, including their respective length, width, location and cost, without the other, or except as one continuous thoroughfare. It is admitted by the petitioner that the improvements so made constituted a single improvement in fact.

We are of opinion that the order of the city council, correctly construed, amounted to an "alteration" of Dwight Street as that word is used in R. L. c. 48, § 1, and as the same word is used in the betterment statutes. R. L. c. 50, § 1. It was said by this court in *Bigelow v. City Council of Worcester*, 169 Mass. 390, at page 393, "A technical alteration is the substitution of one way for another." *Bliss v. Deerfield*, 13 Pick. 102, 106. *Goodwin v. Marblehead*, 1 Allen, 37. It is obvious that the order and the work done thereunder, including the widening of Dwight Street and the laying out of the new street, constituted a single improvement, namely, the substitution of a new way from Lyman Street to State Street,

and authorized the board of aldermen to assess betterments upon the lands specifically benefited, based upon the entire cost of the improvement as a whole. The circumstance that public convenience and necessity required the laying out of the new way, as well as the widening of Dwight Street, did not prevent the assessment of betterments based upon the entire cost. The board of aldermen were authorized to deal with the whole improvement as a unit and to charge those assessed with a share of the total expense. *Yeamans v. County Commissioners*, 16 Gray, 36. *Upham v. Worcester*, 113 Mass. 97. *Alden v. Springfield*, 121 Mass. 27. *Lincoln v. Street Commissioners*, 176 Mass. 210. *Sears v. Street Commissioners*, 180 Mass. 274. *Smith v. Mayor & Aldermen of Worcester*, 182 Mass. 232, 234.

The case of *Arnold v. Cambridge*, 106 Mass. 352, relied on by the petitioner, is plainly distinguishable from the case at bar. In that case it appears that a single assessment was levied as a "just proportion" of the expense of the construction of two sidewalks under St. 1863, c. 191. The sidewalks were on two separate and distinct highways which, although they united at one point, yet formed two lines of travel nearly parallel to each other for about two miles. It was said in that case at page 355: "The power to treat two sidewalks in two distinct streets as one, for the purposes of assessment, is not given by the statute."

So far as cases cited by the petitioner and decided in other jurisdictions are not in harmony with the conclusion here reached, we are not constrained to follow them. As no error of law which would warrant a quashing of the order is shown, the entry must be

Petition dismissed.

AUGUSTA LEVY vs. RALPH A. STEIGER.

MARY LEVY vs. SAME.

Worcester. September 29, 1919. — October 10, 1919.

Present: RUGG, C. J., DE COURCY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Contributory. Statute. Conflict of Laws.

St. 1914, c. 553, placing upon the defendant, in an action to recover damages for injuries to the person or property or for causing the death of a person, the burden of alleging and of proving contributory negligence of the person injured or killed, affects procedure only, and therefore is applicable in an action brought in this Commonwealth for personal injuries suffered in another State.

TORT for personal injuries received by the plaintiffs when they were riding as guests in a motor vehicle which came into collision with a motor vehicle driven by the defendant at the intersection of Pawtucket Avenue and Waterman Avenue in the town of East Providence in the State of Rhode Island. Writs dated September 9, 1918.

In the Superior Court the actions were tried together before *Hammond, J.*, who at the request of the plaintiffs ruled that St. 1914, c. 553, was applicable to the cases on trial although the injuries were received in the State of Rhode Island. The jury found for the plaintiff in the first action in the sum of \$5,000 and for the plaintiff in the second action in the sum of \$2,000; and the defendant alleged exceptions.

C. C. Milton, (F. L. Riley with him,) for the defendant.

G. S. Taft, for the plaintiffs.

DE COURCY, J. The plaintiffs were injured in a collision between an automobile, in which they were riding as guests, and a car driven by the defendant. Although the parties are residents of this Commonwealth, the accident occurred in the town of East Providence in the State of Rhode Island. The judge of the Superior Court ruled that the Massachusetts St. 1914, c. 553, was applicable to the cases on trial; and accordingly instructed the jury that the defendant had the burden of showing contributory negligence on

the part of the plaintiffs. The defendant's exception to this ruling and instruction raises the single question before us.

It is elementary that the law of the place where the injury was received determines whether a right of action exists; and that the law of the place where the action is brought regulates the remedy and its incidents, such as pleading, evidence and practice. *Davis v. New York & New England Railroad*, 143 Mass. 301. *Hoadley v. Northern Transportation Co.* 115 Mass. 304. While there may be cases where it is difficult to decide whether a particular enactment relates to procedure or to substantive rights, it was settled in *Duggan v. Bay State Street Railway*, 230 Mass. 370, where its construction and constitutionality were in question, that this "due care" statute, so called, is one of procedure. As the court expressly said, in construing the statute, with a view to determining its constitutionality (page 377): "These two parts of the statute do not undertake to change the substantive law of negligence in any respect. The tribunal hearing the case must still be satisfied on all the evidence that the plaintiff was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury, and that the defendant was negligent." And again (page 380): "The present statute simply affects procedure and the burden of proof. It does not work any modification of fundamental rights." See also *Miller v. Flash Chemical Co.* 230 Mass. 419, 422; *Chicago Terminal Transfer Railroad v. Vandenberg*, 164 Ind. 470, 488; *Sackheim v. Pigueron*, 215 N. Y. 62. In *Lemieux v. Boston & Maine Railroad*, 219 Mass. 399, relied on by the defendant, it was expressly stated: "By the common law of Vermont, as proved at the trial, an employee assumes not only the risks ordinarily incident to his employment but such unusual and extraordinary risks as he knows and comprehends. And the burden is on him to prove as part of his case that he did not know and comprehend the danger. [Citing cases.] This affects the right of action, and does not relate merely to the matter of evidence or procedure. *Morrisette v. Canadian Pacific Railway*, 76 Vt. 267."

Exceptions overruled.

SUPPLEMENT.

OPINION OF THE JUSTICES TO THE GOVERNOR AND COUNCIL.

The "Rearrangement of the Constitution" of the Commonwealth, submitted by the Constitutional Convention to the people for ratification and adoption at the State election on November 4, 1919, and then adopted and ratified, is not the "Constitution or Form of Government for the Commonwealth of Massachusetts."

THE following order was passed by the Governor and Council on December 31, 1919, and on January 5, 1920, was transmitted to the Justices of the Supreme Judicial Court. On January 20, 1920, the Justices returned the answer which is subjoined.

WHEREAS, in connection with the issue and approval of bonds issued and to be issued by the Commonwealth of Massachusetts the question has arisen whether the title of Treasurer and Receiver General of the Commonwealth, as established by the Constitution of 1780 and the amendments thereof, has been changed, by the rearrangement hereinafter referred to, to "Treasurer of the Commonwealth;"

AND WHEREAS, under article XI of chapter VI of the Constitution of Massachusetts, as adopted in 1780, it is provided:

"This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this Commonwealth, in all future editions of the said laws."

AND WHEREAS, articles 157 and 158 of the Rearrangement of the Constitution of the Commonwealth, as adopted at the State election held on the 4th day of November last, provide as follows:

"Art. 157. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amend-

ments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative.

“Art. 158. This form of government shall be enrolled on parchment, and deposited in the secretary’s office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this Commonwealth, in all future editions of such laws.”

ORDERED: That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law:

Whether the Rearrangement of the Constitution of the Commonwealth submitted by the Constitutional Convention to the people for ratification and adoption at the State election held on the 4th day of November last — and at said election approved and ratified — is the “Constitution or Form of Government for the Commonwealth of Massachusetts.”

To His Excellency the Governor and the Honorable Council of the Commonwealth:

The substance of the important question of law in the order adopted by the Governor and Council on December 31, 1919, copy of which is hereto annexed, is: What is now the Constitution of the Commonwealth? Is it the document entitled “Rearrangement of the Constitution,” approved and ratified by a majority of those voting on the matter at the November election of 1919, or is it the Constitution adopted in 1780 with the subsequent amendments?

It is customary, in ascertaining the meaning of any constitutional instrument, to scrutinize its history and consider the circumstances under which it came into existence. Its meaning must be sought primarily from the words used. It cannot be controlled by resort to other written records, or to the opinions of individual statesmen, legislators or publicists. In appropriate instances, other sources of information and enlightenment may be examined, such as reports of committees, utterances in their

deliberative capacity of those presenting such reports and actions of conventions or legislatures. Courts and judges frequently refer in greater or less detail to the debates in assemblies undertaking to frame constitutions or amendments to constitutions in order to throw light upon provisions presented for interpretation. *Opinion of the Justices*, 126 Mass. 557, 561, 591-593, 598, 601. *Legal Tender Case*, 110 U. S. 421, 443. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 317, 318. *United States v. Wong Kim Ark*, 169 U. S. 649, 697-699. *Orr v. Gilman*, 183 U. S. 278, 285. See *Legal Tender Cases*, 12 Wall. 457, 652-656, and *United States v. St. Paul, Minneapolis & Manitoba Railway*, 247 U. S. 310, 318.

The Constitutional Convention convened pursuant to St. 1916, c. 98, after somewhat protracted sessions in 1917 and 1918, and after having proposed three amendments balloted upon at the election of 1917 and after having voted to propose for the popular vote at the election of 1918 nineteen additional amendments to the Constitution, provided for the appointment of a "committee on Rearrangement of the Constitution." The duty of that committee as expressed in the order for its appointment was, "after the submission to the people of all the amendments proposed," to "arrange the Constitution as amended under appropriate titles, and in proper parts, chapters, sections and articles, omitting all sections, articles, clauses and words not in force and making no substantive change in the provisions thereof." Accordingly a committee of nineteen members was appointed. Five were selected as a subcommittee to prepare the rearrangement. That subcommittee made a report in May, 1919, consisting of a draft of a proposed rearrangement. Article 159 of that draft corresponded to Article 157 quoted in the order of the Governor and Council. It was in these words:

"Art. 159. Upon the ratification and adoption of this constitution by the people, the constitution heretofore existing, with all amendments thereto, shall be deemed and taken to be revised, altered, or amended accordingly. All laws not inconsistent with this constitution, and all rights, remedies, duties, obligations, and penalties, which exist and are in force when this constitution is ratified and adopted, shall continue to exist and be in force as heretofore until otherwise provided."

Without doubt the effect of that article, if validly adopted as a part of the fundamental law, would have been to create a new constitution and to substitute it for the pre-existing Constitution with all its amendments. If so adopted the old Constitution and amendments would have ceased to be the charter of government and the new Constitution would have taken its place. We are not aware of any records of the proceedings of the committee of nineteen on rearrangement concerning this report of the sub-committee. It may have been felt that Article 159 as drafted went beyond the power conferred by the convention upon this committee which was simply to arrange the existing Constitution and amendments and not to revise, codify or otherwise draft a new constitution. The one outstanding fact, however, is that the full committee having before it the article numbered 159 just quoted, unequivocally providing for a new constitution, rejected and refused to recommend that article but in its stead framed and reported the very different Article 157 quoted in the order of the Governor and Council. The conclusion is irresistible that a radical change of meaning was intended by the rejection of that article numbered 159 and the insertion in its place of the present Article 157.

The committee on Rearrangement of the Constitution submitted to the convention the "Text of the Rearrangement," a "Report" and a "Memorandum" accompanying its report. In its "Report" are found these words:

"The object of the order [that is the order whereby provision was made for the rearrangement of the Constitution] was, as the committee understands it, to have the existing constitution and its amendments, sixty-six in all, brought together in one body, omitting all 'sections, articles, clauses and words' which by the lapse of time, or by repeal, or annulment, or otherwise have ceased to be in force, and making such rearrangement, with the changes in phraseology and punctuation necessarily involved, as would form a consistent and connected whole. The committee are of opinion that it manifestly was not intended that they should draft a new constitution embodying the existing constitution and amendments, and they have not attempted to do so. They have considered that their duty in that regard was confined to one of rearrangement. The committee have construed the order

to mean that it was the will and purpose of the convention that no change in the existing constitution and its amendments should be made by the committee which would or might in any way affect their meaning or present construction, or the construction which has heretofore been given to the provisions thereof, and they have carefully refrained from making any change which, it seemed to them, would or might have that effect."

The "Memorandum" is a commentary explaining in some detail the several articles of the rearrangement. Respecting the Article 157 quoted in the order of the Governor and Council, being Article 156 in the "Text of the Rearrangement," it is said:

"This is a new division and title. It adopts in part the language of the Act for calling and holding the convention (Acts of 1916 ch 98), and is introduced to show that the proposed draft, if adopted, is to be regarded as a continuation of the existing Constitution and amendments so far as the provisions thereof are in force, and that no substantive change in the present meaning and construction or that which has been heretofore given to them is intended."

When the convention met in the summer of 1919 to consider the report of the committee on rearrangement of the Constitution and the text of the rearranged Constitution Mr. Bryant of Milton, not having been a member of the committee of nineteen on rearrangement, put this searching and vital inquiry: "After we have adopted this, and after the people have voted on it, what is going to be the Constitution of Massachusetts? Where are we going to find it? Is it in this document?" He stated his opinion to be that any question as to the meaning of the Constitution could be resolved only by reference to the old Constitution. He closed by expressing the hope that "the question will be answered for the purpose of the record, at least, after the people have adopted this, where shall we find the Constitution of Massachusetts?" Mr. Parker, a former Attorney General of the Commonwealth and a member of the subcommittee of five as well as of the committee of nineteen on rearrangement, at once answered that question. In the course of his remarks he said, referring to the document reported by the committee, "It is not, as we conceive it, a substituted Constitution, it is a rearranged Constitution, preserving in its phrase all the provisions which are believed to

be now operative. If some that are now operative be not found in the new text they are still existing as the cardinal law of the Commonwealth." Although the records of the convention show that the other four members of the subcommittee on rearrangement were present and participated in the proceedings touching other matters, none of them essayed to reply further to the question of Mr. Bryant or to amplify, qualify or refute the answer made by their colleague, Mr. Parker. The inference from the form of his statement just quoted and from all the circumstances is that he spoke for the committee. There was no other discussion in the convention touching this subject except that another member subsequently asked substantially the same question as that propounded by Mr. Bryant, but no further reply was made.

When the convention in 1917 and in 1918 submitted certain proposed amendments of the Constitution to popular vote, it provided that in case of an affirmative vote the Governor of the Commonwealth should make proclamation of their adoption. It made no such provision in the event of an affirmative vote by the people upon the rearrangement of the Constitution.

The fair inference from these facts concerning the rearrangement of the Constitution and of Article 157 of that rearrangement is that the convention in authorizing the appointment of the committee to make the rearrangement, the committee in making the rearrangement and the convention in finally adopting it did not have the remotest intention of changing in the smallest particular the meaning, scope or effect of the then existing Constitution and its amendments. That is manifest from a mere reading of the votes and reports already quoted. The reasons for that attitude may have been numerous. It may have been because of a determination not to risk disturbance of that which had been settled. The convention had proposed for the vote of the people twenty-two amendments to the Constitution. Most of these were the subject of full discussion and gave rise to considerable contrariety of view among the members. The one relative to the initiative and referendum was very long when compared with any provision of the Constitution or previous amendment. The precise phrase of each amendment was important and had been given painstaking consideration. A fixed purpose that the fruits of such labor and care should not be lost through any accident of

revision of the text would not be unnatural. Many provisions of the Constitution of 1780 and of its amendments have been interpreted and construed by the executive, legislative and judicial departments of government. It may have been thought not wise to unsettle by any possibility this body of constitutional law which has been stabilized by its slow growth.

The approval and the ratification of the rearrangement of the Constitution by the majority of those voting on the subject at the last election do not affect the question proposed in the order of the Governor and Council. That approval and ratification were directed as much to Article 157 as to any other part.

In the light of these circumstances the meaning of Article 157 quoted in the order of the Governor and Council must be ascertained. The first sentence of that article is in these words: "Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof." The words "rearrangement" and "rearranged" do not express revision, codification or the establishment of something new. They are inapt to describe a finality. Nevertheless if the first clause of this sentence stood alone there would be strong implication as matter of construction that "this rearrangement of the existing constitution and the amendments thereto" when validly adopted by the people, would be the Constitution. The shadow thrown upon that construction by the words "rearrangement" and "rearranged" is deepened by the concluding clause, namely, "and shall appear in such rearranged form in all future publications thereof." This clause would be wholly superfluous if "this rearrangement" were itself to be the Constitution. If the rearrangement were to be the Constitution, it would not be a "rearranged form:" it would be itself the entire substance and not a "form," rearranged or otherwise. Moreover, if the rearrangement were the Constitution, manifestly it alone could appear "in all future publications thereof." No other document or instrument could be thought or deemed to be the Constitution, or susceptible of being published as such. Declaration to that end would be vain, especially in view of the provisions of the following Article 158, also quoted

in the order of the Governor and Council. The last word of the first sentence, namely "thereof," under these circumstances seems to refer to the words "the existing constitution and the amendments thereto." The second sentence of Article 157 is in these words: "Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative." That sentence is something different from the formulation of a mere rule of construction. A rule of that nature is at hand in the simple words usually found in general revisions of statutes to the effect that their provisions "so far as they are the same as those of existing statutes, shall be construed as a continuation thereof." R. L. c. 226, § 2. Such a rule of construction recognizes the new as controlling. The second sentence of Article 157 is widely at variance with the thought thus embodied. This sentence signifies that the old Constitution and its amendments shall not be changed in meaning or effect in any part by the rearrangement. The words of this sentence cannot be given force according to the common and approved usage of the language except by holding that in case of any conflict between the provisions of the rearrangement and the Constitution with its amendments, the latter must prevail and those of the rearrangement must yield. Doubtless it was intended that there should be no change made by the rearrangement. But the deeper question is, in case there is a substantial change, which governs? The second sentence of Article 157 seems to us to declare that in such case "the constitution" of 1780 with "its amendments" shall stand in preference to the "rearrangement." That interpretation is not affected by the concluding words of the sentence "as theretofore existing or operative." Whether these are taken as modifying the words "meaning or effect" or the words "constitution or its amendments" they do not shake or obscure the dominant thought expressed by the sentence. That dominant thought is the continued primacy of "the constitution or its amendments" notwithstanding anything contained in the "rearrangement." It is unthinkable that it was intended that there should be at one and the same time two different and separate constitutions. That would be a contradiction of terms. Either the rearrangement or the Constitution of 1780 with its

amendments must be the Constitution. They cannot both be concurrently effective as constitutions. A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers. In its grants of powers, the bounds set for their exercise, the duties enforced and the guarantees established are found the constitutional liberty of the individual and the foundation for the regulated order and general welfare of the community. To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal. Such a great charter cannot itself in the nature of things be made subject in its "meaning or effect" to another instrument. In that event it is not final and that other instrument becomes paramount. Article 157 in its entirety is language apparently not designed to declare the rearrangement as the final law. Its meaning and effect are by the express words of that article made dependent upon the terms of the Constitution and its amendments. Therefore the rearrangement cannot be itself the fundamental law. It is a rearrangement of the old, it is not the creation of a new form of government.

The rearrangement of the Constitution is an important instrument. It purports to present in unified form and in logical sequence the existing and operative provisions of the Constitution. It possesses all the sanctions naturally flowing from the circumstances attendant upon its origin, composition, adoption, approval and ratification. Doubtless its convenience and accessibility are its abundant justification.

We therefore answer that in our opinion the "Rearrangement of the Constitution" described in the order of the Governor and Council is not the "Constitution or Form of Government for the Commonwealth of Massachusetts."

ARTHUR P. RUGG.

HENRY K. BRALEY.

CHARLES A. DE COURCY.

JOHN C. CROSBY.

EDWARD P. PIERCE.

JAMES B. CARROLL.

CHARLES F. JENNEY.

INDEX.

ACTIONABLE TORT.

Evidence in an action of tort against a majority of the municipal council of Lowell, for removing from office the city treasurer and tax collector, upon which it was held, that the members who constituted such majority acted without authority in law and without jurisdiction and were liable personally for damage caused to such officer by their wrongful acts. *Stiles v. Municipal Council of Lowell*, 174.

The cloak of office does not protect executive or administrative officers who interfere with rights of individuals in ways not authorized by law, but they are liable personally for such wrongful interference. *Ibid.*

In the case above described, good faith and absence of malice in the perpetration of the wrong to the plaintiff were held to constitute no defence. *Ibid.*

ADVERSE POSSESSION.

Upon facts found by the master in a suit in equity by a street railway corporation to establish a resulting trust in a parcel of land, it was held that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff or those under whom it claimed. *Boston & Northern Street Railway v. Goodell*, 428.

AGENCY.

Existence of Relation.

An insurance broker, who solicits applications for insurance and delivers them to an agent of an insurance company, which issues policies upon them, is not on these facts an agent of the insurance company. *Sheridan v. Massachusetts Fire & Marine Ins. Co.* 479.

Where an owner of real estate authorized a broker to sell it for a certain sum, and one offered to purchase it for a less sum and signed in duplicate a formal agreement in writing to that effect, delivering the papers to the broker, to whom he was to make an initial payment provided for in the agreement if the broker could get the owner to sign the agreement, and the broker procured the owner's signature, leaving one copy of the agreement with him and retaining the other for the purchaser, it was held that the proposed purchaser constituted the broker as his agent to transmit his offer to the owner and to procure the owner's acceptance. *Dooley v. McDonough*, 77.

In a suit in equity by a mining engineer against a promoter to compel the defendant to assign to the plaintiff certain shares in a mining corporation, it

Agency (continued).

was held that no partnership or fiduciary relation was created by an agreement in the form of a letter from the defendant to the plaintiff whereby he agreed to pay a fixed compensation for services with a contingent share in certain profits. *Ross v. Burrage*, 439.

Evidence at the trial of an action by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife due to the giving way of a railing of a piazza, was held to warrant a finding that repairs upon the railing were made under the authority of the defendant. *Bergeron v. Forest*, 392.

Where at the trial above described, the defendant was called as a witness by the plaintiff, and, subject to exceptions by the defendant, was asked and was required to answer questions, whether any repairs, done on the premises in question before the accident and after the tenant was there, were done by his authority, and whether, if the son repaired the railing in question, he did it with the defendant's authority, it was held that there was no error in permitting such examination. *Ibid.*

Scope of Authority or Employment.

Conflicting evidence as to whether one was an agent with authority to bind his alleged principal by substituting a recognizance for a bail bond, and another surety for a surety company, was held to require that those questions be submitted to the jury. *National Surety Co. v. Naszaro*, 74.

Where in an action by the owner of furniture against the proprietor of a warehouse in which the furniture was stored, for a conversion of a part of the goods, it was held, that the defendant, before delivering all the plaintiff's goods to an alleged agent of the plaintiff, was bound to ascertain the nature and extent of his authority. *Blaisdell v. Hersum & Co. Inc.* 91.

A bailee of chattels, who delivers the chattels to a person not authorized by the owner to receive them, is liable to the owner for a conversion of the goods, whether he was negligent or not. *Ibid.*

In the case above described it also was held that the acts and declarations of the agent plainly were incompetent to prove his authority or the extent of it. *Ibid.*

Where a corporation, incorporated in Maine, had several places of business in this Commonwealth and also one in Nashua, New Hampshire, and permitted its Nashua general manager to use for his own business and pleasure around Nashua a motor vehicle owned by it and duly registered in New Hampshire, and such general manager directed a subordinate to transport goods of his own from Nashua to a city in this Commonwealth in such motor vehicle not registered in this Commonwealth, and while on a public way in this Commonwealth, the operator of the motor vehicle negligently injured another traveller, it was held, in an action against the corporation for injuries, that findings were not warranted either that the motor vehicle was being operated on business of the corporation or that the Nashua general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business. *Gondek v. Cudahy Packing Co.* 105.

At the trial of the action above described it was held that a finding was not warranted that the defendant knew or ought to have known of such un-

lawful use of the motor vehicle in Massachusetts so that its acquiescence in such use on the occasion when the plaintiff was injured might be implied. *Gondak v. Cudahy Packing Co.* 105.

In an action for damages resulting from eviction of the plaintiff, it appeared that the agent for the owner assured the plaintiff that his sublease was "all right" and that, relying on that assurance, the plaintiff thereafter paid rent and made repairs, it was held that, even assuming that the agent had authority to bind the owner by such statements, the defendant was not thereby estopped to rely on the statute of frauds and to refuse to be bound by the oral assurance of the agent. *Podren v. Macquarrie*, 127.

A corporation is liable for slanderous words uttered by one of its servants in the course of his employment. *Mills v. W. T. Grant Co.* 140.

At the trial of an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who was asked by an employee of the contractor to "give us a hand" for the purpose of moving the car, and, as he was complying with the request, was killed by the falling of a part of the contractor's rigging caused by a moving of the car, it was held that there was evidence warranting a finding that the defendant's employee had at least implied authority to direct the moving of the car. *Sandon v. Kendall*, 292.

In the same case it also was held that there was evidence that the employee of the contractor had implied authority from the contractor to call the decedent to assist in moving the car. *Ibid.*

In an action upon certain promissory notes against all the shareholders of a voluntary association under a declaration of trust which, in *Frost v. Thompson*, 219 Mass. 360, was held to be a partnership and not a trust, it was held that the association and the individual shareholders were bound by the acts of the acting treasurer in signing and indorsing the notes in question and that a finding for the plaintiff was warranted. *Horgan v. Morgan*, 381.

At the trial of an action for personal injuries from being run into by a motor truck driven by a man in the general employ of the defendant, it appeared that the truck was purchased only four days before and that the driver was accompanied by an instructor furnished by the seller of the truck and had been told by the defendant to learn as fast as he could; that the accident happened after the driver's regular work for the day had been finished and when he was on his way home. The judge refused a request to rule that, if the driver of the truck was driving for the sole purpose of going to his own home, he was acting outside the scope of his employment, and upon the evidence it was held that the instruction requested should have been given. *McGrath v. Wehrle*, 456.

Evidence of a certain statement of an employee of the defendant given at the trial of an action for personal injuries caused by the plaintiff being struck by an iron washer thrown from a window of the defendant's building was held incompetent as against the defendant as not being within the scope of the authority of the employee who made it, but having been admitted without objection, it was held that it should be given its probative force. *Douglas v. Holyoke Machine Co.* 573.

In the same case it was held that the statement referred to was no evidence

Agency (continued).

that the throwing of the washer was a part of the defendant's business or that the defendant was negligent. *Douglas v. Holyoke Machine Co.* 573. In the case above described it was held that a verdict ought to have been ordered for the defendant, because the most that could be found in favor of the plaintiff was that the washer that injured the plaintiff came out of a window of the defendant's building by the act of one of its employees, without any indication that this was done in furtherance of the defendant's business. *Ibid.*

Termination.

At the trial of an action of contract for commission claimed by the plaintiff it was held that whether the defendant had waived his right to terminate the contract depended upon what was the intent of the parties and was a question of fact for the jury, who were warranted in finding that there had been such a waiver. *Emerson v. Ackerman*, 249.

Independent Contractor.

Conditions of the contract of employment of a claimant under the workmen's compensation act against a town, upon which it was held that the claimant was an independent contractor and not an employee of the town and could not be awarded compensation. *Eckert's Case*, 577.

ALIEN ENEMY.

Where an heir at law domiciled in Germany, who had appeared by attorney prior to the declaration of war and had also joined with others in an appeal to the Supreme Judicial Court from the decree allowing the will, filed a motion *in limine* praying that the litigation as to the validity of the will should be suspended until the cessation of hostilities, it was held that the motion was properly denied and such denial was not contrary to the provisions of the "Act to define, regulate and punish trading with the enemy, and for other purposes," U. S. St. 1917, c. 106, nor to any provision of the Hague Convention of 1907, nor to the general principles of the common law. *Riddell v. Fuhrman*, 69.

The inhibition against the appearance of alien enemies in courts of this Commonwealth does not prevent them from being parties defendant or respondent. *Ibid.*

ASSIGNMENT.

In a suit in equity to enforce an assignment by a contractor to a subcontractor a proper decree is one directing the owner to pay to the subcontractor the amount of the order with interest from the filing of the bill, and, where the contractor was adjudicated a bankrupt, to pay the balance of the debt due to the contractor to his trustee in bankruptcy. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

An order by a building contractor directing the owner of a building to pay to a subcontractor a certain sum out of a balance due the contractor, is as between the parties an assignment when delivered to the owner. *Ibid.*

An order by a creditor upon his debtor to pay less than the whole of the debt to a third person, was held to be valid as an assignment and enforceable in a suit in equity although it could not be enforced in an action at law. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

An assignment, by a beneficiary of a trust under a will, of an assignable vested expectant interest in the income of the trust, made in good faith for a valuable consideration to a trustee for certain of his creditors to be used for the payment of their claims, whether it be treated as a partial or a full assignment of income, cannot successfully be attacked by the assignor himself or by a trustee in bankruptcy of his estate appointed in proceedings begun more than four months after the assignment was effected. *Ibid.*

Where a beneficiary under the provisions of a trust is entitled to a certain fractional portion of the income of the trust semiannually, such right is a present, equitable right of ownership which ripens into an ordinary property right when the income accumulated in the hands of the trustee becomes payable, and an assignee of the beneficiary's interest in the trust succeeds to such right and may enforce it in equity. *Ibid.*

Where one having a wife and children has a policy of insurance on his life payable to his legal representatives, the equitable interest in the policy of any of the persons who will be his next of kin and heirs at law in case he dies intestate is assignable during the lifetime of the insured, and if he dies intestate such assignment may be enforced in equity. *Sloan v. Breedon*, 418.

ATTACHMENT.

If the holder of the title to certain real estate delivers a deed of it to one who does not record the deed, but who at once as part of the same transaction executes and delivers a deed of the premises to a third person, and it does not appear that the record title was retained in the first holder for the purpose of fraudulently securing the land from attachment or to delay, defeat or defraud creditors, an attachment of the land thereafter made in an action against the first grantee, as land of the first grantee standing in the name of the record holder of the title, is ineffectual, and a purchaser at an execution sale after a levy following a judgment in such action receives no title either under the provisions of R. L. c. 167, § 63, or of R. L. c. 178, § 1, because at the time of the attachment the land described was not "the land of [the] debtor." *Piantadori v. Nally*, 158.

Where the plaintiff in an action at law has attached on mesne process an undivided share of the defendant in certain real estate as an heir at law of his

Attachment (*continued*).

mother, and after the attachment and before judgment the administrator of the mother's estate sells the real estate for the payment of debts, retaining a surplus in which the defendant's share is more than sufficient to satisfy the plaintiff's claim, and where the plaintiff obtains judgment and immediately notifies the administrator of his lien and demands payment of his claim from the proceeds of the sale and within thirty days after the judgment brings a suit in equity to enforce his rights, the plaintiff has established his lien and is entitled to payment out of the proceeds of the sale in the hands of the administrator as against a creditor claiming under a subsequent attachment. *Bartlett v. Moore*, 481.

ATTORNEY AT LAW.

In an action against the surety on a poor debtor's recognizance it was said that it was unnecessary to determine whether the creditor's counsel by his appearances at the hearings and other acts, without raising any objection to the regularity of the proceedings, had waived the right to object to any failure of the debtor properly to surrender himself for examination or to any want of jurisdiction in the court over the person of the debtor, because as matter of law the evidence did not warrant a finding that there had been any breach of the recognizance. *McKeon v. Briggs*, 99.

An attorney at law, who is a member of the bar of another State but not of Massachusetts, may recover the value of professional services rendered in this Commonwealth to a client here, if he did not hold himself out as lawfully qualified to practise in the courts of this Commonwealth. *Brooks v. American Association of Masters, Mates & Pilots*, 168.

BAIL.

No action can be maintained by a surety company upon a contract in writing to indemnify it against loss which it might incur by reason or in consequence of having executed a bail bond to secure the release of one under arrest in Connecticut, if it appears that the bail bond, when presented to the clerk of the court in Connecticut, was refused by him and that the prisoner was released upon the personal recognizance of an officer of the surety company. *National Surety Co. v. Nazaro*, 74.

Where there was conflicting evidence as to whether one was an agent with authority to bind his alleged principal by substituting a recognizance for a bail bond, and another surety for a surety company, the fact of agency and its scope was for the jury to determine. *Ibid*.

Difference between a bail bond and a recognizance pointed out. *Ibid*.

BAILMENT.

Where in an action by the owner of furniture against the proprietor of a warehouse in which the furniture was stored, for a conversion of a part of the goods, it was held, that the defendant, before delivering all the plaintiff's goods to an alleged agent of the plaintiff, was bound to ascertain the nature and extent of his authority. *Blaisdell v. Hersum & Co. Inc.* 91.

In the case above described it also was held that the acts and declarations of

the agent plainly were incompetent to prove his authority or the extent of it. *Blaisdell v. Hersum & Co. Inc.* 91.

A bailee of chattels, who delivers the chattels to a person not authorized by the owner to receive them, is liable to the owner for a conversion of the goods, whether he was negligent or not. *Ibid.*

In the same case it was held that the defendant as a bailee of the plaintiff's property impliedly contracted to return it to her or to some third person with her express wish or implied consent. *Ibid.*

BANKRUPTCY.

An assignment, by a beneficiary of a trust under a will, of an assignable vested expectant interest in the income of the trust, made in good faith for a valuable consideration to a trustee for certain of his creditors to be used for the payment of their claims, whether it be treated as a partial or a full assignment of income, cannot successfully be attacked by the assignor himself or by a trustee in bankruptcy of his estate appointed in proceedings begun more than four months after the assignment was effected. *Woodard v. Snow*, 267.

Where, in an agreement pledging personal property to secure the payment of a note of the pledgor, it is provided that, in case of bankruptcy of the pledgor, the pledgee is empowered to sell the security, it is not a condition precedent to a right on the part of the trustee in bankruptcy of the pledgor to maintain an action of tort for conversion against the pledgee and a related corporation, to which the pledgee sold the pledged property, and by which the pledgee was controlled, that a tender first should be made to the pledgee of the amount to secure which the pledge was made, since the pledgee had put it out of his power to return the property. *Whitman v. Boston Terminal Refrigerating Co.* 386.

Under an agreement pledging certain personal property to secure the payment of a note of the pledgor, the pledgee, in any sale of the pledged property made after the pledgor becomes bankrupt, must act in good faith and use every reasonable effort to protect the interest of the pledgor. *Ibid.*

Where a bankrupt is a nominal party to a suit in equity in which he is represented by his trustee in bankruptcy and prevails in the suit, the costs to which he would be entitled if a real party in interest should be awarded to his trustee in bankruptcy. *Loonie v. Wilson*, 420.

BILL OF LADING.

Upon the evidence, at the trial of an action in the Municipal Court of the City of Boston for the price of goods sold and delivered, where the plaintiff delivered the goods to a carrier who issued a non-negotiable bill of lading naming the defendant as consignee of which the defendant had no notice, the bill of lading not being in evidence, it was held that it must be assumed, upon an appeal by the plaintiff from an order of the Appellate Division vacating a finding for the plaintiff and ordering judgment for the defendant, that the mere failure of the plaintiff to forward the non-negotiable bill of lading to the defendant had no effect upon the defendant's right to demand delivery of the goods. *Edelstone v. Schimmel*, 45.

Bill of Lading (continued).

As a general rule, a non-negotiable contract of shipment is discharged by delivery of the goods to the consignee without the surrender or production of the bill of lading. *Edelstone v. Schimmel*, 45.

BILLS AND NOTES.

Consideration.

Where, in an action on the last of a series of renewal notes for the alleged balance due on a loan, which was originally for a sum less than \$1,000, from one who was not in the business of making small loans, it appeared that when the last note of such series of notes was made, the sum of the amounts the creditor had received on the principal of the original note and on the notes given in renewal thereof, together with the interest he had paid in excess of eighteen per cent per annum, was sufficient fully to pay the original loan, it was held that the last note was without consideration. *Koltin v. Brown*, 16.

There was nothing in the circumstances above described which would warrant a finding that the defendant had waived his right under the statute by the executing and delivering of the last note, because at the time he did so there was no debt in existence. *Ibid.*

Facts appearing at the trial of an issue submitted to the Superior Court upon an appeal by an administratrix from an adverse decree of the Probate Court upon her petition for the allowance of a claim by her, personally, as a creditor against the estate upon a promissory note of the intestate payable to his father and indorsed by the father to the petitioner, the issue being, whether the intestate was indebted to the petitioner upon the note, upon which it was held that the issue was for the jury, and that the judge could not rightly order it answered in the negative. *Crowdis v. Haywood*, 377.

Where, at the trial above described, the judge, without objection by either party, submitted to the jury a special question as to whether there was a consideration for the note as between father and son, which the jury answered in the affirmative, it was held that it was not open to the respondents to contend that the petitioner was not a holder in due course. *Ibid.*

Where at the same trial there was evidence tending to show that the consideration for the indorsement of the note to the petitioner was a promise to remain with the father so long as he lived, and the judge charged the jury, subject to an exception by the respondents, "A promise to remain with the family as long as . . . [the father] . . . should live would be sufficient consideration to make the note good in her hands, even though it had been made to . . . [the father] . . . without any consideration, unless . . . [the petitioner] . . . knew that the note was originally made without consideration," it was held that the special finding of the jury that there was a consideration for the note as between father and son rendered the exception to the instruction immaterial. *Ibid.*

The settlement before entry of an action for a debt barred by the statute of limitations is a good consideration for a note and mortgage, the debt having existed at the time of the settlement although the remedy for it was extinguished. *Clark v. Jones*, 591.

Holder in Due Course.

Evidence in an action against a merchant by or in behalf of an indorsee of a promissory note made by the merchant and indorsed and delivered for value before maturity, upon which it was held that the indorsee, being a holder in due course, could recover on the note even if the transaction were in connection with a voting contest which was tainted with illegality. *Whitman v. Fournier*, 154.

Payment.

Where, in an action on the last renewal note given in a certain transaction, it appeared that, previous to the giving of the note, the sum of all payments on account of principal and of interest in excess of eighteen per cent per annum was sufficient fully to pay the original loan, the provisions of § 51 of the act applied, and it was held that, when the note in suit was given, the debt already had been discharged, so that the note was without consideration. *Koltin v. Brown*, 16.

In the case above stated it also was held to be immaterial that the payments which amounted to a sufficient sum to discharge the original loan had been made by different persons liable for the amount borrowed. *Ibid*.

Validity.

Findings of a master in a suit in equity brought by a trust company against a corporation to which another corporation had transferred its assets in fraud of its creditors, on three notes of the original corporation which the plaintiff had discounted for the controlling officer and stockholder of the old corporation upon which it was held that the plaintiff trust company was entitled to recover the amount of these notes from the defendant new corporation. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

In the same case it was pointed out that, the notes having been discounted by the trust company in good faith in the usual course of business at the request of the controlling officer and stockholder, acting in behalf of the principal defendant as its treasurer, the master was warranted in finding that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the principal defendant. *Ibid*.

A promissory note, given for articles to be used as prizes in a voting contest, payable to one who promoted the contest for the merchant, is not invalid. *Whitman v. Fournier*, 154.

In an action upon certain promissory notes against all the shareholders of a voluntary association under a declaration of trust which, in *Frost v. Thompson*, 219 Mass. 360, was held to be a partnership and not a trust, it was held that the association and the individual shareholders were bound by the acts of the acting treasurer in signing and indorsing the notes in question and that a finding for the plaintiff was warranted. *Horgan v. Morgan*, 381.

BOARD OF HEALTH.

An ordinance of the city of Boston and a regulation by the board of health, which prohibited the transporting of garbage through the public ways of

Board of Health (*continued*).

the city except by the city or its contractors and their agents, were held to be justifiable as reasonable exercises of the police power. *Wheeler v. Boston*, 275.

BOND.

To secure Release from Arrest.

Difference between a bail bond and a recognizance pointed out. *National Surety Co. v. Nazaro*, 74.

A bond given by a defendant arrested on meane process to secure his release from arrest, not good as a statutory bond under R. L. c. 169, § 2, which was held to be valid as a contract at common law. *Graves v. Apt*, 587.

Where in an action against the surety on a common law bond given to secure the release of one arrested on meane process, it appeared that the defendant surety offered to show that, before signing the bond, she said in substance that she did not in any way desire to make herself liable for the judgment, and the trial judge excluded the evidence, it was held that the exclusion was right, as the defendant surety could not thus control or vary the obligation of the contract in writing. *Ibid*.

In the same case it was held that the circumstances under which the contract was executed and the facts to which it related could be considered in order to apply the words "shall not avoid" in accordance with the intention of the parties. *Ibid*.

In the same case it was held that by the proper construction of the words "shall not avoid" in the condition of the bond the surety was bound to have her principal in court when judgment should be obtained and execution issued against him, so that execution might be levied upon him. *Ibid*.

BOSTON.

An ordinance of the city of Boston and a regulation by the board of health, which prohibited the transporting of garbage through the public ways of the city except by the city or its contractors and their agents, were held to be justifiable as reasonable exercises of the police power. *Wheeler v. Boston*, 275.

BOSTON AND ALBANY RAILROAD COMPANY.

The Boston and Albany Railroad Company, which leased its entire property to the New York Central and Hudson River Railroad Company with the approval of the Commonwealth as given by St. 1900, c. 468, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and is not subject to the tax imposed by that statute. *Attorney General v. Boston & Albany Railroad*, 460.

BOSTON AND MAINE RAILROAD.

The jurisdiction given to the Supreme Judicial Court by St. 1913, c. 784, § 27, in equity to review, annul, modify or amend any rulings or orders of the public service commission extends to an order made by that commission in

regard to the consolidation of the railroad companies constituting the Boston and Maine Railroad system and the reorganization of that system under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323. *Brown v. Boston & Maine Railroad*, 502.

On a bill in equity under St. 1913, c. 784, § 27, by minority stockholders of the Boston and Maine Railroad to review an order of the public service commission approving the agreement for the consolidation of the Boston and Maine Railroad system and the plan for the reorganization of that system, it was held that certain notes of the Boston and Maine Railroad outstanding on March 31, 1915, amounting to \$13,306,000, constituted a valid debt. *Ibid.*

In St. 1898, c. 194, authorizing the Boston and Maine Railroad to purchase the shares of any railroad corporation whose road is leased to or operated by it, or of which it owns a majority of the capital stock, the means provided in § 2 of that statute for purchasing such shares by the issue and sale of its own capital stock is not exclusive of other methods of purchase, and the money for the purchase may be provided by the sale of notes of the company. *Ibid.*

Even assuming that the purchase by the Boston and Maine Railroad of shares in its leased and subsidiary lines by means of the sale of notes was *ultra vires*, it could be and was ratified by subsequent legislation. *Ibid.*

Sections 2 and 6 of Spec. St. 1915, c. 380, giving the public service commission authority to approve certain acts of the Boston and Maine Railroad after notice and hearing, lawfully confer upon the commission administrative powers and *quasi* judicial functions. *Ibid.*

The provisions of Spec. St. 1915, c. 380, deal with a situation peculiar to the Boston and Maine Railroad and its leased lines, no other railroad corporation being similarly situated, and in no way violate the constitutional provisions requiring equal laws. *Ibid.*

The approval, in the order of the public service commission above referred to, of the issue by the Boston and Maine Railroad, upon vote of two thirds in interest of the common stock of that corporation, at any time before January 1, 1924, of one hundred and twenty thousand shares of the first preferred stock at the par value of \$12,000,000 for the purpose of paying an equal amount at par of bonds issued under the reorganization plan for the payment of the floating indebtedness, was held to be valid under the circumstances shown. *Ibid.*

In the case above described it also was held that the directors of the Boston Railroad Holding Company were authorized to vote on the stock of the Boston and Maine Railroad at the stockholders' meeting, at which the consolidation agreement and reorganization plan were approved. *Ibid.*

In the same case it was held that the delegation by the directors of the holding company of the casting of the vote to two of their number was proper, voting by proxy being authorized by St. 1906, c. 463, Part II, § 37. *Ibid.*

In the same case it was held that, the Boston and Maine Railroad being a Massachusetts corporation, voting by proxy at a meeting of its stockholders held here in accordance with Massachusetts laws was binding upon the corporation, even if it should be assumed that the law of New Hampshire, under the laws of which it also was incorporated, did not allow voting by proxy. *Ibid.*

BROKER.

If an insurance company sends to an insurance broker a notice addressed to a policy holder, for whom the broker had obtained the policy, asking the insured to notify the company in case he wishes to renew his policy, this gives no authority to the broker to bind the insurance company by an oral contract of insurance or by an agreement to issue a policy. *Sheridan v. Massachusetts Fire & Marine Ins. Co.* 479.

An insurance broker, who solicits applications for insurance and delivers them to an agent of an insurance company, which issues policies upon them, is not on these facts an agent of the insurance company. *Ibid.*

CARRIER.

Actions for personal injuries or death of passenger caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CHARITY.

Exemption from Taxation.

In St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, providing that there should not be included among the charitable institutions exempted from taxation corporations whose property is used for an insane asylum, insane hospital or for the treatment of mental or nervous diseases unless at least one fourth of all property so occupied on the basis of valuation thereof, and one fourth of the income of all trust and other funds and property held for the benefit of such institution and not actually occupied by it for such purposes "be used and expended entirely for the treatment, board, lodging or other direct benefit of indigent insane persons, or indigent persons in need of treatment for mental diseases, as resident patients, without any charge therefor to such persons either directly or indirectly," the word "therefor" refers to the words "treatment, board, lodging or other direct benefit." *Massachusetts General Hospital v. Belmont*, 190.

CIVIL SERVICE.

The members of the municipal council of the city of Lowell, in removing an officer whom the charter of the city empowers them to remove under the laws regulating civil service, perform an executive or administrative act which in this particular must be performed in a judicial manner. *Stiles v. Municipal Council of Lowell*, 174.

What constitutes the "review," provided for by St. 1918, c. 247, § 3, upon a petition filed in a police, district or municipal court, of the action of an officer or board resulting in the removal from office, transfer, lowering in rank or compensation or suspension of certain persons classified under the civil service. *Murray v. Justices of the Municipal Court of the City of Boston*, 186.

The provision of the statute above described is for a re-examination of the action sought to be reviewed and does not import a reversal of such action.

if it is found to have been honestly made upon evidence which appears to an unprejudiced mind sufficient to warrant the decision made. *Murray v. Justices of the Municipal Court of the City of Boston*, 186.

In the case above described, it was held that under the provisions of the statute referred to the finding by the judge, that the decision of the board was not made in bad faith and that it did not appear that it was made without proper cause, was warranted and a dismissal of the petition was proper. *Ibid*.

COMPROMISE OF CONTROVERSY CONCERNING WILL.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

CONFLICT OF LAWS.

St. 1914, c. 553, placing upon the defendant, in certain cases, the burden of alleging and proving contributory negligence of the person injured or killed, affects procedure only, and therefore is applicable to an action brought in this Commonwealth for personal injuries suffered in another State. *Levy v. Steiger*, 600.

CONSTITUTIONAL LAW.

Rearrangement of the Constitution.

The "Rearrangement of the Constitution" of the Commonwealth, submitted by the Constitutional Convention to the people for ratification and adoption at the State election on November 4, 1919, and then adopted and ratified, is not the "Constitution or Form of Government for the Commonwealth of Massachusetts." *Opinion of the Justices*, 603.

Due Process of Law.

The provisions in R. L. c. 173, §§ 39-43, requiring a non-resident plaintiff to furnish an indorser for costs, is constitutional. *Keown v. Hughes*, 1; *Keown v. Trudo*, 19.

The enforcement of St. 1909, c. 490, Part I, § 5, cl. 3, as amended, by the collection by the town of Belmont of a tax upon property of the Massachusetts General Hospital in Belmont known as the McLean Hospital, does not deprive the corporation of its property without due process of law. *Massachusetts General Hospital v. Belmont*, 190.

Equal Protection of Laws.

St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, denying exemption from taxation to certain charitable corporations, does not deny to the Massachusetts General Hospital, as the owner of property in the town of Belmont known as the McLean Hospital, which is taxable under the provisions of the statute, the equal protection of the laws guaranteed both by the State and the Federal Constitutions. *Massachusetts General Hospital v. Belmont*, 190.

A classification of charitable corporations for purposes of exemption from taxation which denies exemption to a class of hospitals for nervous diseases, except upon definite conditions, does not effect a clearly hostile discrimination against a particular corporation or person or class outside the limits of general usage, but is in accord with a custom in the classification of charities for the purpose of exemption from taxation which long has obtained in this Commonwealth. *Ibid.*

The mere fact that only two institutions in the Commonwealth are included within the classifications described in the statute above referred to, although it is a factor not to be lightly disregarded, is not conclusive against the validity of the statute, where it appears that the classification is rational. *Ibid.*

General law declaratory of a scheme of public policy as to exemption from taxation may be changed by the General Court provided no constitutional guaranty is violated. *Ibid.*

The provisions of Spec. St. 1915, c. 380, deal with a situation peculiar to the Boston and Maine Railroad and its leased lines, no other railroad corporation being similarly situated, and in no way violate the constitutional provisions requiring equal laws. *Brown v. Boston & Maine Railroad*, 502.

Full Faith and Credit to Judgment of Sister State.

So far as relates to enforcement in the courts of this State, a decree of a court of a sister State for separate maintenance or for alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt or a decree of a court of equity for the payment of money, and it is immaterial whether the original decree was based on an action of contract or on a petition for separate maintenance in divorce or probate proceedings. *White v. White*, 39.

A decree for the plaintiff in a suit in equity in our Superior Court to enforce a decree of a New Jersey court of chancery ordering a husband to pay a certain sum of money to his wife, the plaintiff, for her separate maintenance, may be enforced by proceedings in contempt, although the decree of the Superior Court merely directs that a certain sum of money be paid to the plaintiff by the defendant and that execution issue therefor. *Ibid.*

A decree of a court of chancery of New Jersey will be enforced as a foreign judgment here, but the plaintiff cannot insist that the same method of enforcement be used here as the one provided in the decree in New Jersey for enforcement there. *Ibid.*

Interstate Commerce.

A motor vehicle devoted exclusively to the transportation of passengers for hire between a city in another State and a city in this Commonwealth, is engaged in interstate commerce. *Commonwealth v. O'Neil*, 535.

Police Power.

An ordinance of the city of Boston, and a regulation by the board of health, which prohibited the transporting of garbage through the public ways of the city except by the city or its contractors and their agents, were held to be justifiable as reasonable exercises of the police power. *Wheeler v. Boston*, 275.

It is within the limits of the police power for a municipality to confine to a single person or corporation the collection, transportation through its streets and final disposition of garbage, which is an actual and potential source of disease and a detriment to the public health and may easily become a public nuisance. *Ibid.*

Property Rights.

The removal of the exemption from taxation, effected by St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, does not deprive such corporation of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights. *Massachusetts General Hospital v. Belmont*, 190.

Referendum.

Upon a petition for a writ of mandamus addressed to the Secretary of the Commonwealth commanding him to provide the petitioners with blanks for the use of subsequent signers of a petition filed under art. 48 of the Amendments to the Constitution asking for a referendum on a joint resolution of the General Court, it was held that the court had no power to pass upon an abstract question. *Sullivan v. Secretary of the Commonwealth*, 543.

Taxation.

The enforcement of St. 1909, c. 490, Part I, § 5, cl. 3, as amended, by the collection by the town of Belmont of a tax upon property of the Massachusetts General Hospital known as the McLean Hospital, does not deprive the corporation of its property without due process of law. *Massachusetts General Hospital v. Belmont*, 190.

The removal of the exemption from taxation, effected by the amendment above described, does not deprive such corporation of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights. *Ibid.*

The tax as assessed upon the corporation as above described is not a violation of the requirement of c. 1, § 1, art. 4 of the Constitution of the Commonwealth that taxes be "proportional and reasonable." *Ibid.*

In the absence of some binding contract, no one has a legal right to the continuance of existing laws as to taxation. *Ibid.*

The statute above described as amended is not an unworkable piece of legislation. *Ibid.*

CONTRACT.

What constitutes.

No action can be maintained by a surety company upon a contract in writing to indemnify it against loss which it might incur by reason or in consequence of having executed a bail bond to secure the release of one under arrest in Connecticut, if it appears that the bail bond, when presented to the clerk of the court in Connecticut, was refused by him and that the prisoner was released upon the personal recognizance of an officer of the surety company. *National Surety Co. v. Nazzaro*, 74.

Where an owner of real estate authorized a broker to sell it for a certain sum, and one offered to purchase it for a less sum and signed in duplicate a formal agreement in writing to that effect, delivering the papers to the broker, to whom he was to make an initial payment provided for in the agreement, if the broker could get the owner to sign the agreement, and the broker procured the owner's signature, leaving one copy of the agreement with him and retaining the other for the purchaser, it was held that the one who made the offer could not revoke it after the owner had signed the agreement, and that the owner might maintain an action against the proposed purchaser for the initial payment. *Dooley v. McDonough*, 77.

Consideration.

In an action by a subcontractor against a landowner on the latter's agreement to pay the subcontractor's bill, if the subcontractor would not try to enforce a mechanic's lien, it was held that under R. L. c. 197, § 2, a lien for labor only could have been enforced against the defendant's property, and that the plaintiff's forbearance to enforce his claim for the labor was a valid consideration for the defendant's promise, the mere inadequacy of the consideration, in the absence of fraud, being no defence to an action on the defendant's promise to pay the plaintiff's whole claim. *Manson v. Flanagan*, 150.

Evidence at the trial of an action, by the administrator of the estate of the wife of a tenant, under a tenancy at will for causing conscious suffering and death of the wife due to the giving way of a railing of a piazza, which was held to warrant a finding that the defendant undertook to make repairs for a consideration, namely, to induce the tenant to continue his occupancy. *Bergeron v. Forest*, 392.

Evidence at the trial of an action against a landlord for death and conscious suffering of a tenant's wife caused by the giving way of a railing of a piazza, bearing on counts in the declaration which alleged that the repairs upon the railing of the piazza were made gratuitously by the landlord, which was held to have warranted a finding of a gratuitous agreement by the defendant with the wife to make the repairs, negligence in the making of which caused her injury. *Ibid.*

At the hearing of a suit in equity, seeking to compel the return to the individual plaintiffs of certain shares of stock of the corporation plaintiff, which were alleged to have been transferred to the defendant under the terms of an oral contract, oral evidence, tending to show that the actual consideration for the making by the defendant of a certain agreement in writing was the

transfer to the defendant by the plaintiff of the shares of stock which the plaintiff by the suit was seeking to have returned to him, was held to be admissible, where the agreement made no statement whatever as to the transfer of those shares, but mentioned only certain shares which were transferred to the defendant as collateral. *Fay v. Corbett*, 403.

The settlement before entry of an action for a debt barred by the statute of limitations is a good consideration for a note and mortgage, the debt having existed at the time of the settlement although the remedy for it was extinguished. *Clark v. Jones*, 591.

Validity.

An attorney at law, who is a member of the bar of another State but not of Massachusetts, may recover the value of professional services rendered in this Commonwealth to a client here, if he did not hold himself out as lawfully qualified to practice in the courts of this Commonwealth. *Brooks v. American Association of Masters, Mates & Pilots*, 168.

Where a lessee, voluntarily and deliberately with knowledge of the facts and without any misrepresentation or fraud on the part of the lessor, agreed to pay a fixed rent on two parcels of land and a rent equal to nine per cent of the valuation of two other parcels of back land as assessed by the proper authorities of a city, it was held that the lessee could not maintain a suit in equity to compel a separate assessment of the two parcels of back land. *Hippodrome Amusement Co. v. Wit*, 216.

In an action by one railroad corporation against another for the defendant's refusal to take a lease of the plaintiff's railroad, which refusal constituted an alleged breach of a so called "Agreement for Lease" executed under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, where, by the agreement sued upon, the parties agreed to execute the lease "as the same may be modified by the Railroad Commission of Massachusetts," it was held that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained. *Hampden Railroad v. Boston & Maine Railroad*, 411.

In a suit in equity brought upon a contract which cancelled an earlier agreement, it was held to be unnecessary to consider whether a certain provision of the subsequent contract was a misrepresentation of fact or whether, if a misrepresentation, it was a material one, because there was no finding by the master that the plaintiff relied upon the alleged misrepresentation. *Ross v. Burrage*, 439.

It was held that, under certain language in a will, a trust was created for the benefit of the husband of the testatrix during his life with a remainder to the children, which might be contingent, but that, whether it was contingent or vested, a certain instrument signed by the children with their father, consenting to the sale by their father of real and personal property in which they agreed to join, and providing that at the death of the father the money should be paid "to his legal representatives," was in conformity in substance to the provisions of the will and did not change the terms of the trust created by it. *Conant v. St. John*, 547.

In a suit in equity by a second mortgagee to redeem the real estate from a first

Contract (*continued*).

construction mortgage, where it appeared that the first mortgagee was to advance an agreed sum of money in instalments, and the mortgagor orally agreed with the first mortgagee, in consideration of his promise to make the loan, to pay him a bonus of an agreed amount, it was held, that the bonus was not a mere gratuity but that the contract for its payment was a valid one and that, in order to redeem the property, the plaintiff must pay to the first mortgagee the amount of the bonus in addition to the amount of money advanced by the first mortgagee. *Kempton v. Boyle*, 579.

A bond given by a defendant arrested on mesne process to secure his release from arrest, not good as a statutory bond under R. L. c. 169, § 2, which was held to be valid as a contract at common law. *Graves v. Apt*, 587.

Conditions of a certain offer in writing by owners of land to a city to accept in full of damages for their land and buildings taken or injuriously affected by the proposed widening and laying out of certain streets the amounts set opposite their respective names, were held when accepted by the acts of the city, to have been valid; and it also was held the sums named, being "in full of damages," no interest should be allowed. *King v. Springfield*, 592.

Construction.

Where a loan is secured by a pledge of collateral, with a contract containing a power of sale clause which is enforceable if, and when, the borrower makes an assignment for the benefit of creditors, the assignees of the borrower are entitled to recover from the lender in an action of contract any interest in excess of that which shall have accrued to the date of the sale of the collateral, whether such excess was prepaid or was retained from the net proceeds of the sale. *Gaston v. Boston Penny Savings Bank*, 23.

In a case where an express company under contract with a railroad company was to be paid for business done for it on the basis of a certain percentage of the gross revenue received, payments to be made monthly with an annual adjustment, and an article of the contract provided that the agreement was "subject to all existing and future Federal and State laws," it was held that, in the determination of the amount for which the express company should be charged as trustee of the railroad company in an action begun by trustee process in which the railroad was defendant, it was entitled to be credited with the amount due to it from the defendant under a ruling of the State court of Oklahoma, adjudging that rates of the railroad had been too large and must be in part refunded. *Reynolds v. Missouri, Kansas & Texas Railway*, 32.

Where, at the trial of an action of contract for commissions claimed by the plaintiff on sales of sole leather to a certain firm, it appeared that there was no express agreement as to the duration of the contract and there was no evidence from which such an agreement could be implied, it was held that the defendant could terminate the contract upon reasonable notice to the plaintiff. *Emerson v. Ackerman*, 249.

In a suit against a mortgagee of demised premises subject to a lease, who had agreed to be bound by the provisions of the lease if he foreclosed his mortgage, and who had so foreclosed, it was held that evidence of the conduct of the original lessor and the defendant was admissible to show the construction put upon an ambiguous provision of the lease as to heating by the parties themselves. *New York Central Railroad v. Stoneman*, 258.

A provision in a lease, "that the demised premises shall be heated by the lessors to a proper warmth for office purposes," was held to relate only to the degree of heat to be furnished and not to a part of the day or week during which the building was to be heated. *New York Central Railroad v. Stoneman*, 258.

In the suit above described, it also was held that the defendant, having agreed, as mortgagee, at the making of the lease, to be bound by its terms in case he foreclosed his mortgage before its termination, could not, after such foreclosure, place upon the lease an interpretation different from what the original parties intended and adopted as their construction of its provisions. *Ibid*.

If the true import and meaning of an instrument in writing cannot be determined from its language, it will be construed most strongly against the party using the uncertain language. *Ibid*.

Construction of certain contracts between a distributor of moving picture films and a theatre owner, each of which contained a clause providing that either party to them, by a notice given within ten days after the exhibition of any picture, might limit the contract to one additional picture upon the delivery of which the contract should terminate, wherein it was held that the limiting provision did not mean that the defendant might elect either to repudiate the contracts in the beginning or to terminate them by notice, and in either event be liable in damages for the loss of one picture only under each contract, that, in determining the extent of the plaintiff's damages, the possibility of termination of the contracts should be considered. *Orbach v. Paramount Pictures Corp.* 281.

Where in an antenuptial agreement a man agrees to provide by his will so that his intended wife shall have a certain portion of his estate, and she agrees to accept that portion in full of dower and of other rights, there is an implied term of the agreement that, if the man fully performs the agreement, the woman will not contest the proof of a will made by the man in performance of the agreement. *Eaton v. Eaton*, 351.

In an equity suit by a mining engineer against a promoter to compel the defendant to assign to the plaintiff certain shares in a mining corporation, it was held that no partnership or fiduciary relation was created by an agreement in the form of a letter from the defendant to the plaintiff, setting forth that the plaintiff should receive a salary of \$500 a month and when away from Boston his actual travelling expenses, and, excepting one corporation, five per cent of such common shares as might come to the defendant in resulting promotions, as profit, and that the relation of the writer of the letter to the person addressed was merely that of employer to employee, the five per cent of common shares mentioned being compensation for services in addition to the salary of \$500 a month and his travelling expenses when away from Boston. *Ross v. Burrage*, 439.

In interpreting the same contract it was held that the employee was to receive in the common shares of companies which actually had acquired, through the defendant, properties in Chile and Peru brought to him by or through the plaintiff, five per cent of such common shares as had come to the defendant as profit by virtue of such taking over, and that such percentage was not earned by the acquisition by such companies of an option to purchase not yet exercised. *Ibid*.

Contract (*continued*).

In an action against the surety on a common law bond given by a defendant arrested on mesne process to secure his release from arrest, it was held that by the proper construction of the words "shall not avoid" in the condition of the bond the surety was bound to have her principal in court when judgment should be obtained and execution issued against him, so that execution might be levied upon him. *Graves v. Apt*, 587.

In the same case it was held that the circumstances under which the contract was executed and the facts to which it related could be considered in order to apply the words "shall not avoid" in accordance with the intention of the parties. *Ibid*.

Construction of lease of land, see appropriate subtitle under LANDLORD AND TENANT.

Effect of custom, see subtitle, *post*.

Performance and Breach.

Where, in confirmation of an oral contract of sale, a sales slip made by the vendor and handed to the purchaser contained a clerical error stating the price too low, and the purchaser seized upon such clerical error and persistently declared to the vendor that the slip as made expressed the true terms of the contract, such conduct on his part may be found to constitute a repudiation of the contract. *Edelstone v. Schimmel*, 45.

Utter denial of an essential term of a contract may be found to be a disavowal of the contract. *Ibid*.

No action can be maintained by a surety company upon a contract in writing to indemnify it against loss which it might incur by reason or in consequence of having executed a bail bond to secure the release of one under arrest in Connecticut, if it appears that the bail bond, when presented to the clerk of the court in Connecticut, was refused by him and that the prisoner was released upon the personal recognizance of an officer of the surety company. *National Surety Co. v. Nazzaro*, 74.

Although a separation agreement between a husband and wife and a trustee, provided that the wife should not institute any action against the husband on the ground of non-support, and she, on March 7 of a year when the agreement was in force, brought in the Probate Court a petition for separate maintenance, upon which there never was a hearing, and which was dismissed without prejudice by agreement of the parties on the tenth day of the next month, it was held that it could not be said as a matter of law that the wife had forfeited her rights under the agreement by the bringing of the petition in the Probate Court. *Proctor v. Lombard*, 213.

A title to real estate, not a good title of record, may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance of the real estate which does not expressly require a conveyance of a good title of record will be enforced in equity. *Morse v. Stober*, 223.

At the trial of an action for the breach of contracts by a corporation, which was a distributor of moving picture films, to furnish to the plaintiff and to license him to exhibit at his theatre a certain number of films, it was held that the evidence introduced by the plaintiff as to his receipts before and during the period which the contract was to have covered and as to the patronage enjoyed by a competitor of the plaintiff in the same neighbor-

hood who was exhibiting the defendant's films, was competent to give the jury a satisfactory basis on which to find substantial damages. *Orbach v. Paramount Pictures Corp.* 281.

Where in an antenuptial agreement a man agrees to provide by his will so that his intended wife shall have a certain portion of his estate and she agrees to accept that portion in full of dower and of other rights, there is an implied term of the agreement that, if the man fully performs the agreement the woman will not contest the proof of a will made by the man in performance of the agreement. *Eaton v. Eaton*, 351.

Where a man has entered into an antenuptial agreement with a woman, who becomes his wife, to give to her by will a proportional part of his estate, he cannot make gifts, either absolutely, conditionally, indirectly or otherwise, for the main purpose of defeating the provisions of the agreement and of preventing it from operating for the wife's benefit. *Ibid.*

Where a lessee, voluntarily and deliberately with knowledge of the facts and without any misrepresentation or fraud on the part of the lessor, agreed to pay a fixed rent on two parcels of land and a rent equal to nine per cent of the valuation of two other parcels of back land as assessed by the proper authorities of a city, it was held that the lessee could not maintain a suit in equity to compel a separate assessment of the two parcels of back land. *Hippodrome Amusement Co. v. Wit*, 216.

Where at the trial of an action of contract for commissions claimed by the plaintiff on sales of sole leather to a certain firm, it appeared that there was no express agreement as to the duration of the contract and there was no evidence from which such an agreement could be implied, it was held that the defendant could terminate the contract upon reasonable notice to the plaintiff. *Emerson v. Ackerman*, 249.

Where at the trial above described, there was evidence that the defendant wrote a letter to the plaintiff declining further to continue paying him a commission on sales to the firm in question; that shortly thereafter the defendant told the plaintiff that he would get his commission and anything that was coming to him, and the plaintiff received from the defendant commissions through the month of April, beyond the date of the notice, it was held that whether the defendant had waived his right to terminate the contract depended upon what was the intent of the parties and was a question of fact for the jury, who were warranted in finding that there had been such a waiver. *Ibid.*

Effect of Custom.

Collection and discussion by RUGG, C. J., of decisions relating to the effect upon contracts and commercial transactions of customs and usages. *Conahan v. Fisher*, 234.

Customs, which are in conflict either with express or with implied terms of a contract or which undertake to avoid the effect of settled rules of law or to make for a definite class of cases or persons a law singular to such class, are invalid. *Ibid.*

Although it appeared at the trial of a suit in equity by a railroad company, lessee of part of a building, to compel the landlord to furnish heat on nights and holidays and Sundays, that there was a custom in Boston of heating office buildings from eight o'clock in the morning to six o'clock in the evening unless the lease called for heat beyond those hours, it was held that it

Contract (continued).

could not be ruled as a matter of law that the lessee was not entitled to have the premises heated twenty-four hours of every day, where it also appeared that it was necessary for the proper operation of the plaintiff's railroad for it to use the premises on holidays, Sundays and at night. *New York Central Railroad v. Stoneman*, 258.

Abandonment.

A letter by the wife to the trustee, under a separation agreement between a husband and wife and a trustee, releasing and dismissing the trustee and requesting that her "monthly allowance of Thirty Dollars," be sent to her at her home address, while it well might discharge the trustee as the wife's attorney, cannot as a matter of law be said to have terminated her rights under the agreement, especially as the wife continued to receive monthly payments from her husband. *Proctor v. Lombard*, 213.

Modification.

Where a separation agreement between a husband and his wife and a third person as a trustee provided for payments by the husband to the trustee for the benefit of the wife of \$55 per month, and the payments for a time were in the sum of \$30 per month, but there was no specific agreement on the wife's part that such payments should be accepted in full satisfaction of the requirements of the agreement, it cannot be ruled as a matter of law, in a suit in equity for the enforcement of the agreement, that the payments of less than the sum stated in the agreement were accepted as full satisfaction and not merely as part payments. *Proctor v. Lombard*, 213.

Rescission.

Where an owner of real estate authorized a broker to sell it for a certain sum, and one offered to purchase it for a less sum and signed in duplicate a formal agreement in writing to that effect, delivering the papers to the broker, to whom he was to make an initial payment provided for in the agreement if the broker could get the owner to sign the agreement, and the broker procured the owner's signature, leaving one copy of the agreement with him and retaining the other for the purchaser, it was held that the one who made the offer could not revoke it after the owner had signed the agreement, and that the owner might maintain an action against the proposed purchaser, for the initial payment. *Dooley v. McDonough*, 77.

Repudiation.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under

the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

Termination.

A letter by the wife to the trustee, under a separation agreement between a husband and wife and a trustee, releasing and dismissing the trustee and requesting that her "monthly allowance of Thirty Dollars" be sent to her at her home address, while it well might discharge the trustee as the wife's attorney, cannot as a matter of law be said to have terminated her rights under the agreement, especially as the wife continued to receive monthly payments from her husband. *Proctor v. Lombard*, 213.

Where at the trial of an action of contract for commissions claimed by the plaintiff on sales of sole leather to a certain firm, it appeared that there was no express agreement as to the duration of the contract and there was no evidence from which such an agreement could be implied, it was held that the defendant could terminate the contract upon reasonable notice to the plaintiff. *Emerson v. Ackerman*, 249.

Construction of certain contracts between a distributor of moving picture films and a theatre owner, each of which contained a clause providing that either party to them, by notice given within ten days after the exhibition of any picture, might limit the contract to one additional picture, upon the delivery of which the contract should terminate, wherein it was held that the limiting provision did not mean that the defendant might elect either to repudiate the contracts in the beginning or to terminate them by notice, and in either event be liable in damages for the loss of one picture only under each contract. *Orbach v. Paramount Pictures Corp.* 281.

In Writing.

If the true import and meaning of an instrument in writing cannot be determined from its language, it will be construed most strongly against the party using the uncertain language. *New York Central Railroad v. Stoneman*, 258.

In a lease, containing a provision "that the demised premises shall be heated by the lessors to a proper warmth for office purposes," there was no provision as to the part of the day or week during which the demised premises should be kept heated, and it was held that in that respect the lease was ambiguous, so that extrinsic evidence was admissible to show what was the intention of the parties upon that question. *Ibid.*

At the hearing of a suit in equity, seeking to compel the return to the individual plaintiffs of certain shares of stock of the corporation plaintiff, which were alleged to have been transferred to the defendant under the terms of an oral contract, oral evidence, tending to show that the actual consideration for the making by the defendant of a certain agreement in writing was the transfer to the defendant by the plaintiff of the shares of stock which the plaintiff by the suit was seeking to have returned to him, was held to be admissible, where the agreement made no statement whatever as to the transfer of those shares, but mentioned only certain shares which were transferred to the defendant as collateral. *Fay v. Corbett*, 403.

A bond given by a defendant arrested on meane process to secure his release

Contract (continued).

from arrest, not good as a statutory bond under R. L. c. 169, § 2, which was held to be valid as a contract at common law. *Graves v. Apt*, 587.

Where in the same action it appeared that the defendant surety offered to show that, before signing the bond, she said in substance that she did not in any way desire to make herself liable for the judgment, and the trial judge excluded the evidence, it was held that the exclusion was right, as the defendant surety could not thus control or vary the obligation of the contract in writing. *Ibid*.

Antenuptial Contract.

A suit in equity may be maintained to enjoin the widow of a testator from contesting the proof of his will, if by so doing she violates the provisions of an antenuptial agreement between herself and the testator which was fully performed by him. *Eaton v. Eaton*, 351.

Where in an antenuptial agreement a man agrees to provide by his will so that his intended wife shall have a certain portion of his estate and she agrees to accept that portion in full of dower and of other rights, there is an implied term of the agreement that, if the man fully performs the agreement, the woman will not contest the proof of a will made by the man in performance of the agreement. *Ibid*.

One named as executor of a will made in performance of such an antenuptial agreement, in case the widow undertakes to contest the proof of the will, has sufficient interest to maintain a suit in equity to enjoin such contest although he has not yet been appointed executor. *Ibid*.

Where a man and a woman undertake by an antenuptial agreement to establish their respective property rights in the estate of the first to die, the parties do not stand at arm's length toward one another, and their relation is such that they are held to reasonableness and good faith toward one another in its performance. *Ibid*.

While a man has entered into an antenuptial agreement with a woman, who becomes his wife, to give to her by will a proportional part of his estate, he cannot make gifts, either absolutely, conditionally, indirectly or otherwise, for the main purpose of defeating the provisions of the agreement and of preventing it from operating for the wife's benefit. *Ibid*.

Conduct of a testator in relation to his property after entering into an antenuptial agreement, which, it was held, warranted a finding that the husband had not carried out the antenuptial agreement with reasonableness and good faith, and which required the dismissal of a suit in equity by persons named as executors of the will to enjoin the prosecution of a contest of the will by the widow. *Ibid*.

A widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the husband's alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and § 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing, and an agreement to make a will also must be in writing. *Sughrue v. Barlow*, 468.

Building Contract.

An instrument in writing signed by a building contractor and the owner of certain real estate, which it was held, did not fulfil the requirement of Sts. 1915, c. 292; 1916, c. 306, as to a mechanic's lien. *Varnum v. Kogios*, 264.

For Making of Lease.

In an action by one railroad corporation against another for the defendant's refusal to take a lease of the plaintiff's railroad, which refusal constituted an alleged breach of a so called "Agreement for Lease" executed under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, where, by the agreement sued upon, the parties covenanted to execute a lease "as the same may be modified by the Railroad Commission of Massachusetts," it was held that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained. *Hampden Railroad v. Boston & Maine Railroad*, 411.

Implied.

Where in an antenuptial agreement a man agrees to provide by his will so that his intended wife shall have a certain portion of his estate and she agrees to accept that portion in full of dower and of other rights, there is an implied term of the agreement that, if the man fully performs the agreement, the woman will not contest the proof of a will made by the man in performance of the agreement. *Eaton v. Eaton*, 351.

Of Landlord to make Repairs.

If a landlord undertakes by a contract with the tenant to make certain repairs on the premises and makes the repairs negligently, he is liable for injuries resulting therefrom to all persons who within the contemplation of the parties were to use the premises under the tenancy. *Bergeron v. Forest*, 392.

In the same case it was held that the evidence warranted a finding of a gratuitous agreement by the defendant with the wife of the plaintiff to make the repairs which caused her injury. *Ibid.*

To make Devise or Legacy.

Effect of antenuptial agreement, fixing the division to be made of the husband's property by his will, upon his power to dispose of his property differently in his lifetime. *Eaton v. Eaton*, 351.

A widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the husband's alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and § 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing and an agreement to make a will also must be in writing. *Sughrus v. Barlow*, 468.

CONVERSION.

A bailee of chattels, who delivers the chattels to a person not authorized by the owner to receive them, is liable to the owner for a conversion of the goods, whether he was negligent or not. *Blaisdell v. Hersum & Co. Inc.* 91.
If the pledgee, in an agreement pledging certain personal property to secure the note of the pledgor, is a corporation doing business in Boston, whose entire common stock is owned by a corporation doing business in Springfield, by which it is managed and controlled, and, acting under orders of and in combination with the Springfield corporation, upon the bankruptcy of the pledgor, for the sole purpose of benefiting the two corporations, sells and ships the pledged property to the Springfield corporation at a price below the market price and it is sold by the Springfield corporation within thirty days at a very substantial profit, such a sale to the Springfield corporation may be found to be fraudulent and voidable at the election of the pledgor and to amount to a conversion. *Whitman v. Boston Terminal Refrigerating Co.* 386.

CORPORATION.

Corporation controlled by another Corporation.

If a pledgee, under an agreement authorizing the sale of the pledged property in the event of the pledgor becoming bankrupt, being a corporation doing business in Boston, whose entire common stock is owned by a corporation doing business in Springfield, by which it is managed and controlled, and, acting under orders of and in combination with the Springfield corporation, upon the bankruptcy of the pledgor, for the sole purpose of benefiting the two corporations, sells the pledged property to the Springfield corporation at a price below the market price and it is sold by the Springfield corporation within thirty days at a very substantial profit, such a sale to the Springfield corporation may be found to be fraudulent and voidable at the election of the pledgor and to amount to a conversion. *Whitman v. Boston Terminal Refrigerating Co.* 386.

Upon the evidence in a suit in equity under R. L. c. 159, § 3, cl. 8, by a judgment creditor of a corporation to reach and apply to the payment of the judgment debt property of the principal defendant fraudulently conveyed to a new corporation, it was held that the findings of the judge as to fraudulent intent not only were warranted but required and that the plaintiff was entitled to a decree. *Schurman v. Improved Plastic-Slate Roofing Co.* 499.

Charitable.

Under what circumstances the personal property and real estate of a charitable corporation being used "for the treatment of mental or nervous diseases" within the meaning of those words as used in St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, is subject to taxation. *New England Sanitarium v. Stoneham*, 171.

Where a charitable corporation in a catalogue under the caption, "Diseases of the nervous system," sets forth its facilities for the successful treatment of

nervous prostration, neurasthenia, and nerve exhaustion, it was held that the treatment thus described is "treatment of mental or nervous diseases" within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1. *New England Sanitarium v. Stoneham*, 171.

Construction of St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, which provides that there should not be included among the charitable institutions exempted from taxation, corporations whose property is used for an insane asylum, insane hospital or for the treatment of mental or nervous diseases unless certain conditions as to indigent patients are complied with, pointing out that the word "therefor" therein used, refers to the words "treatment, board, lodging or other direct benefit." *Massachusetts General Hospital v. Belmont*, 190.

Foreign.

Evidence as to the control over a motor vehicle owned by a foreign corporation and negligently operated by an employee of the owner within this Commonwealth, upon which it was held, in an action against the corporation for injuries, that findings were not warranted either that the motor vehicle was being operated on business of the corporation or that its general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business. *Gondek v. Cudahy Packing Co.* 105.

A corporation, which was incorporated under the laws of the State of Maine and which for more than thirty days has had several places of business in this Commonwealth, does not come within the definition of "non-resident," given in St. 1914, c. 204, § 1, under the provisions of the statute relating to registration of motor vehicles. *Ibid.*

A motor vehicle of a foreign corporation, having a place of business in this Commonwealth, while being operated upon a public way in this Commonwealth without having been registered here, is an outlaw. *Ibid.*

Officers and Agents.

Voting by proxy at a meeting of stockholders of a Massachusetts corporation held here in accordance with the laws of Massachusetts is binding upon the corporation, although by the laws of another State in which it is incorporated, voting by proxy is not allowed. *Brown v. Boston & Maine Railroad*, 502.

Circumstances under which the directors of a holding company were held authorized to vote the stock of a corporation at a stockholders meeting, and to delegate that power to two of their number. *Ibid.*

Liability in Tort.

A corporation is liable for slanderous words uttered by one of its servants in the course of his employment. *Mills v. W. T. Grant Co.* 140.

Taxation.

See TAX, Corporation.

Ultra Vires.

In an action by one railroad corporation against another for the defendant's refusal to take a lease of the plaintiff's railroad, which refusal constituted an alleged breach of a so called "Agreement for Lease" executed under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, where, by the agreement sued upon, the parties agreed to execute the lease "as the same may be modified by the Railroad Commission of Massachusetts," it was held that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained. *Hampden Railroad v. Boston & Maine Railroad*, 411.

In a suit in equity, by a street railway corporation against one who had been an officer of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors to establish a resulting trust in certain land, it appeared that the consideration for the purchase of the property was not furnished by the defendant, that the property always had been treated as belonging to the plaintiff, and that returns filed with State officers and sworn to by the defendant contained a statement that the land was "owned by the company, needed in operating road," and it was held the evidence warranted a finding by the master that the land was owned lawfully by the company and was not held *ultra vires*. *Boston & Northern Street Railway v. Goodell*, 428.

In a suit in equity under St. 1913, c. 784, § 27, by minority stockholders of the Boston and Maine Railroad to review a certain order of the public service commission it was said that, even assuming that the purchase by the Boston and Maine Railroad of shares in its leased and subsidiary lines by means of the sale of notes was *ultra vires*, it could be and was ratified by subsequent legislation. *Brown v. Boston & Maine Railroad*, 502.

Consolidation and Reorganization

It is lawful for the Legislature to provide in enacting a general plan for the consolidation of several railroads that an existing corporation, to which the others become joined, shall assume and pay or provide for the payment or refunding as its own debts of other subsidiary companies as part consideration for the purchase of their property and franchises, which otherwise under existing law it would be unlawful for it to pay or refund. *Brown v. Boston & Maine Railroad*, 502.

CUSTOM.

Collection and discussion by Rugg, C. J., of decisions relating to the effect upon contracts and commercial transactions of customs and usages. *Conahan v. Fisher*, 234.

In an action by a member of the family of a tenant at will of one floor of a

three-tenement building against the landlord for personal injuries resulting from the breaking of a railing which was a part of the demised premises, it was held that evidence of a custom to the effect that the owner should make necessary repairs and keep the property tenantable and in safe condition, was not admissible. *Conahan v. Fisher*, 234.

Customs, which are in conflict either with express or with implied terms of a contract or which undertake to avoid the effect of settled rules of law or to make for a definite class of cases or persons a law singular to such class, are invalid. *Ibid.*

Where at the trial of an action by the administrator of the estate of the wife of a tenant at will of a dwelling for conscious suffering and death of the wife caused by the giving way of a railing of a piazza, evidence tending to show that throughout the district where the dwelling in question was, there was a custom that it was the duty of the landlord to make repairs upon the railings of piazzas which were a part of the premises let, was held to be inadmissible. Following *Conahan v. Fisher*, *ante*, 234. *Bergeron v. Forest*, 392.

Although it appeared at the trial of a suit in equity by a railroad company, lessee of part of a building, to compel the landlord to furnish heat on nights and holidays and Sundays, that there was a custom in Boston of heating office buildings from eight o'clock in the morning to six o'clock in the evening unless the lease called for heat beyond those hours, it was held that it could not be ruled as a matter of law that the lessee was not entitled to have the premises heated twenty-four hours of every day, where it also appeared that it was necessary for the proper operation of the plaintiff's railroad for it to use the premises on holidays, Sundays and at night. *New York Central Railroad v. Stoneman*, 258.

DAMAGES.

For Breach of Contract.

In an action by a vendor of goods against a purchaser for damages resulting from a repudiation of the sale, it is proper to assess as damages the amount, if any, by which the contract price exceeds the market price of the goods at the time and place fixed by the contract for performance. *Edelstone v. Schimmel*, 45.

Finding as to the amount of damages in an action by a seller against a buyer for breach of contract of sale as to which it was held that, while founded upon slight evidence, it could not be said to be unwarranted. *Ibid.*

At the trial of an action for the breach of contracts by a corporation, which was a distributor of moving picture films, to furnish to the plaintiff and to license him to exhibit at his theatre a certain number of films, it was held that the evidence introduced by the plaintiff as to his receipts before and during the period which the contract was to have covered and as to the patronage enjoyed by a competitor of the plaintiff in the same neighborhood, who was exhibiting the defendant's films, was competent to give the jury a satisfactory basis on which to find substantial damages. *Orbach v. Paramount Pictures Corp.* 281.

Damages (*continued*).

For Property taken or damaged under Statutory Authority.

Conditions of a certain offer in writing by owners of land to a city to accept in full of damages for their land and buildings taken or injuriously affected by the proposed widening and laying out of certain streets the amounts set opposite their respective names, which were held, when accepted by the acts of the city, to be valid, and the sums named, being "in full of damages," no interest was allowed. *King v. Springfield*, 592.

In Tort.

Where the city treasurer and tax collector of Lowell, after his removal by the wrongful act of the members of the city council and subsequent reinstatement by order of the court, brought an action of tort against the majority of the council personally, it was held that the amounts reasonably paid by him for counsel fees in procuring reinstatement to office constituted an element of his damages. *Stiles v. Municipal Council of Lowell*, 174.

In the same case it was held that the plaintiff was entitled to have the jury consider as an element of his damages the loss he sustained by reason of his being compelled to resign because he was unable to secure a bond owing to the incidents attendant upon the litigation and of being unable to obtain more lucrative employment elsewhere. *Ibid*.

At the trial of the action above described, the plaintiff was entitled to have the jury consider as an element of his damage such mental suffering on his part as was a natural and proximate result of the wrongful acts of the defendants. *Ibid*.

Where, at the trial of an action of tort for damages to a horse and wagon the property of the plaintiff, caused by collision with a street car, the plaintiff was permitted to testify as to the value of the property before and after the collision, he is not harmed by not being permitted to ask his driver how much the horse had depreciated in value because of the collision nor by not being permitted himself to testify how much a new horse cost. *McNeil v. Middlesex & Boston Street Railway*, 254.

In an action against a pledgee and a confederate for conversion of the pledged property by a wrongful sale, the plaintiff may recover the fair market value of the pledged property less the amount of the debt for which the goods were pledged. *Whitman v. Boston Terminal Refrigerating Co.* 386.

In an action of tort for personal injuries arising from a collision, the defendant may show that the injuries attributed by the plaintiff to the collision were in fact caused by other and previous accidents, and for this purpose evidence as to other previous injuries may be admitted. *Morrissey v. Connecticut Valley Street Railway*, 554.

In an action of tort for personal injuries evidence of the plaintiff's habits in the excessive use of intoxicating liquor may be relevant and admissible upon the issue of damages, where carefully confined to that issue by the presiding judge. *Ibid*.

DECEIT.

In a suit in equity brought upon a contract which cancelled an earlier agreement, it was held to be unnecessary to consider whether a certain provision of the subsequent contract was a misrepresentation of fact or whether, if a

misrepresentation, it was a material one, because there was no finding by the master that the plaintiff relied upon the alleged misrepresentation. *Ross v. Burrage*, 439.

DEED.

Language employed in conveyances of parcels of land, made subsequently to the recording of a plan of a tract of forty lots and four ways, which tract included the land described in such conveyances, was held to warrant a finding by a judge of the Land Court that by a certain deed from the tract the original owner disclosed a purpose not to follow, but to abandon the layout of a way. *Stevens v. Young*, 304.

In the same case it was held that the wording of the conveyances warranted a further finding that the original owner by a certain deed executed by him to the respondent's predecessor in title, intended to convey the fee in one of the ways and in part of the second of the ways included in a solid tract described but without giving to the grantee any easement in the remainder of the second way. *Ibid.*

In the above case it also was held that the language employed in the conveyances warranted a decree by the Land Court registering in the petitioner the unincumbered title to that part of a way, indicated on the plan which lay between the land on both sides of it owned by him. *Ibid.*

Language in the deed of a lot of land to four grantees containing an equitable restriction prohibiting the erection of a building on the land and requiring the land to be kept as an open park for the benefit of the grantees, which required the conclusion that the restriction continued to exist not only for the benefit of the land of the grantees but also for that of the adjoining lands of the grantor and became appurtenant to any parts into which those lands might be divided. *Amherst v. Gates*, 583.

DEVISE AND LEGACY.

Determination of Amount of Legacy.

Upon the construction of a will, which by the fourth clause placed in trust for the children of a deceased son of the testator "a sum equal to the amount that my said son would have received had he been living at the time of my death," it was held that such sum was not a sum equal to what the son would have received had he survived his father and his father had died intestate, but was determined by the amount which would have come to the son under a fifth or residuary clause of the will. *Lamb v. Jordan*, 335.

Extrinsic Evidence of Intention of Testator.

If a reading of the whole of a testator's will produces a conviction that he must necessarily have intended the giving of an interest which is not given by express and formal words or the denial of a benefaction which is not manifested by an apt phrase, the defect must be supplied by implication and the language used by the testator so moulded as to carry into effect so far as possible the intention which by his whole will he has sufficiently declared. *Lamb v. Jordan*, 335.

Where the meaning of a will is not ambiguous, extrinsic evidence is not admissible upon the question of the testator's intent. *Ibid.*

Limitations of Legacy.

Facts, upon which it was held that a sum given by the fifth or residuary clause of a will to the children of the testator's deceased son, being given "subject to the conditions heretofore set forth," was subject to the provisions of trust and survivorship set out in the fourth clause. *Lamb v. Jordan*, 335.

"Lineal Heirs."

Where by her will a mother gave a life estate to her son with power of appointment among her "lineal heirs" in the event of his dying leaving no issue, and the son provided by his will that a portion of the fund should be held in trust for the benefit of a niece of the son during her life, but if she should die leaving no issue surviving her, then the said portion to go "to the lineal heirs of" the testator's mother, it was held that the testator intended to use the words "lineal heirs," in the same sense that his mother had used them in her will. *Ernst v. Rivers*, 9.

In the same case it also was held that the words "lineal heirs" meant descendants of the mother who were living at the death of the niece, who were in the same degree of relationship. *Ibid.*

Where a testator, in the exercise of a power of appointment over a fund given him by his mother's will, provided in his will that a part of the fund should go to one of his nieces for her life, and if she died leaving no issue surviving her, then the fund so left should be conveyed "to the lineal heirs of" the testator's mother, it was held that the fund should be equally divided among the nine great-grandchildren of the testator's mother. *Ibid.*

Residue Clause.

Where, in construing a will, under certain clauses of which the children of a deceased daughter were each given a specific legacy upon condition that they should not contest the will, it was held that they were excluded from sharing under the fifth, or residue, clause. *Lamb v. Jordan*, 335.

Rule against Perpetuities.

See PERPETUITIES, RULE AGAINST.

Time of Vesting.

Where a testator provided that a trust fund for the benefit of his niece during her life, should go, at her death without issue surviving her, to "the lineal heirs" of the testator's mother, it was held that the trust provision was not void as a violation of the rule against perpetuities. *Ernst v. Rivers*, 9.

Trust.

See TRUST, Construction.

Upon Condition not to contest Will.

Commonly a devise or legacy upon condition that the beneficiary shall not contest the will is the full expression of testamentary bounty for such beneficiary. *Lamb v. Jordan*, 335.

On a bill in equity for a construction of the will of a testator, which, besides a first clause as to the payment of debts and a sixth clause as to the nomination of executors, contained four clauses, a second and a third clause each giving, respectively, a legacy of \$500 to one of the children of the deceased daughter "upon the expressed condition that" the grandchild named should, "not contest this will" and providing that, in case of such contest, such contestant "takes nothing," it was held that under the provision of the second and third clauses, the children of the deceased daughter were excluded from sharing under the fifth, or residue, clause. *Lamb v. Jordan*, 335.

EASEMENT.

Language employed in conveyances of parcels of land, made subsequently to the recording of a plan of a tract of forty lots and four ways, which tract included the land described in such conveyances, which was held to warrant a finding that the original owner by a certain deed executed by him to the respondent's predecessor in title, intended to convey the fee in one of the ways and in part of the second of the ways included in a solid tract described but without giving to the grantee any easement in the remainder of the second way. *Stevens v. Young*, 304.

ELECTION.

In a suit in equity, by one as the surviving executor of the will of his father and also as devisee under that will against his brother, to enjoin the further prosecution by the defendant of an action at law on an agreement in writing executed by the plaintiff's testator about seventeen years before his death, it was held that, by accepting the benefits of the will, the defendant had elected to ratify the will and thereby had lost his right to enforce the provisions of the earlier contract which would prevent its operation, and that the plaintiff was entitled to an injunction restraining the defendant from further prosecuting his action at law. *Noyes v. Noyes*, 55.

Construction of certain contracts between a distributor of moving picture films and a theatre owner, each of which contained a clause providing that either party to them, by notice given within ten days after the exhibition of any picture, might limit the contract to one additional picture, upon the delivery of which the contract should terminate, wherein it was held that the limiting provision did not mean that the defendant might elect either to repudiate the contracts in the beginning or to terminate them by notice, and in either event be liable in damages for the loss of one picture only under each contract. *Orbach v. Paramount Pictures Corp.* 281.

EQUITABLE RESTRICTIONS.

Language in the deed of a lot of land to four grantees containing an equitable restriction prohibiting the erection of a building on the land and requiring the land to be kept as an open park for the benefit of the grantees, which required the conclusion that the restriction continued to exist not only for the benefit of the land of the grantees but also for that of the

adjoining lands of the grantor and became appurtenant to any parts into which those lands might be divided. *Amherst v. Gates*, 583.

EQUITY JURISDICTION.

Laches.

Upon facts found by a master in a suit in equity by a street railway corporation, against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land it was held that the plaintiff's claim was not barred by laches. *Boston & Northern Street Railway v. Goodell*, 428.

Plaintiff must come into Court with Clean Hands.

Where three persons were associated together in a transaction concerning certain land, and the two who held the legal title subsequently died and their heirs refused to recognize the right of the third to a one third undivided interest in the land so purchased and he was compelled to bring a suit in equity to enforce his rights, it was held that the conduct of the plaintiff in certain transactions which may have been a fraud upon the seller but which was not a fraud upon his associates, was no defence to such suit. *Magee v. Magee*, 341.

Specific Performance of Contract.

While the only way in which a mortgagee can be certain that the foreclosure of his mortgage will not be in violation of the Soldiers' and Sailors' Civil Relief Act, is to foreclose the mortgage under an order of a court of equity, nevertheless it is not impossible for a mortgagee, after purchasing the real estate at a foreclosure sale without such an order of a court, to prove beyond a reasonable doubt that no person in the military service of the United States had any interest, legal or equitable, in the premises in question, so that he might maintain a suit in equity for specific performance against one who had agreed to purchase the property from him. *Morse v. Stober*, 223.

A title to real estate, not a good title of record, may be shown by oral or other evidence outside the record to be marketable beyond any reasonable doubt, so that specific performance of a contract for conveyance of the real estate which does not expressly require a conveyance of a good title of record will be enforced in equity. *Ibid*.

A suit in equity may be maintained to enjoin the widow of a testator from contesting the proof of his will, if by so doing she violates the provisions of an antenuptial agreement between herself and the testator which was fully performed by him. *Eaton v. Eaton*, 351.

To avoid Unconscionable Contract.

Where a lessee, voluntarily and deliberately with knowledge of the facts, and without any misrepresentation or fraud on the part of the lessor, agreed to pay a fixed rent on two parcels of land and a rent equal to nine per cent of the valuation of two other parcels of back land as assessed by the proper authorities of a city, it was held that the lessee could not maintain a suit

in equity to compel a separate assessment of the two parcels of back land. *Hippodrome Amusement Co. v. Wit*, 216.

To compel Reconveyance of Real Estate.

When an appeal is pending from a decree of the Probate Court allowing the will of an alleged testator, the Probate Court under R. L. c. 137, §§ 10, 11, may authorize a special administrator of the testator's estate to prosecute a pending suit in equity brought by the testator in his lifetime to procure a reconveyance of real estate. *Purcell v. Purcell*, 62.

To compel Retransfer of Shares of Corporation.

At the hearing of a suit in equity, seeking to compel the return to the individual plaintiffs of certain shares of stock of the corporation plaintiff, alleged to have been transferred to the defendant under the terms of an oral contract, oral evidence, tending to show that the actual consideration for the making by the defendant of a certain agreement in writing was the transfer to the defendant by the plaintiff of the shares of stock which the plaintiff by the suit was seeking to have returned to him, was held to be admissible, where the agreement made no statement whatever as to the transfer of those shares, but mentioned only certain shares which were transferred to the defendant as collateral. *Fay v. Corbett*, 403.

Where, in a suit in equity by a mining engineer against a promoter to compel the defendant to assign to the plaintiff certain shares of stock in mining corporations, it appeared that there was an agreement providing for the payment as compensation to the plaintiff of a certain sum per month and a percentage of such shares as should come to the defendant as profit by virtue of the plaintiff's efforts, it was held that such percentage was not earned by the acquisition of an option to purchase not yet exercised. *Ross v. Burrage*, 439.

To enforce Assignment.

An order by a creditor upon his debtor to pay less than the whole of the debt to a third person, was held to be valid as an assignment and enforceable in a suit in equity although it could not have been enforced in an action at law. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

Where a beneficiary under the provisions of a trust is entitled to a certain fractional portion of the income of the trust semiannually, such right is a present, equitable right of ownership which ripens into an ordinary property right when the income accumulated in the hands of the trustee becomes payable, and an assignee of the beneficiary's interest in the trust succeeds to such right and may enforce it in equity. *Woodard v. Snow*, 267.

Where one having a wife and children has a policy of insurance on his life payable to his legal representatives, the equitable interest in the policy of any of the persons who will be his next of kin and heirs at law in case he dies intestate is assignable during the lifetime of the insured, and if he dies intestate such assignment may be enforced in equity. *Sloan v. Breeden*, 418.

To enforce Resulting Trust.

Under the circumstances, it was held that, where three persons were equal owners of certain securities which by agreement among them were exchanged for certain real estate in Montana, the title being taken in the name of two of them at the request of the third, such third party, by a bill in equity might enforce a resulting trust in a one third undivided interest in the real estate and compel a conveyance to him of such interest. *Magee v. Magee*, 341.

To enjoin Contest of Will.

A suit in equity may be maintained to enjoin the widow of a testator from contesting the proof of his will, if by so doing she violates the provisions of an antenuptial agreement between herself and the testator which was fully performed by him. *Eaton v. Eaton*, 351.

One named as executor of a will made in performance of such an antenuptial agreement in case the widow undertakes to contest the proof of the will, has sufficient interest to maintain a suit in equity to enjoin such contest although he has not yet been appointed executor. *Ibid*.

To enjoin Enforcement of Void Decree.

Where the Superior Court made a decree purporting to be under the workmen's compensation act, and the record showed that the death of the employee occurred in the course of his employment on a steamship lying at a wharf upon navigable waters, it was held that such a decree being void on its face for want of jurisdiction because the injury was maritime in its nature and not within the scope of the workmen's compensation act, it was not necessary to determine whether the insurer could maintain a bill in equity to enjoin the enforcement of the void decree. *Sterling's Case*, 485.

To enjoin Foreclosure of Mortgage.

A gratuitous promise to discharge a debt evidenced by a note secured by a mortgage of real estate, not accompanied by the redelivery of the note or mortgage or by the execution or delivery of any instrument to carry out the promise, does not extinguish the debt nor, after the death of the mortgagee, give to the mortgagor a right to maintain a suit in equity to enjoin the foreclosure of the mortgage by the administrator of his estate. *Cardozo v. Leveroni*, 310.

To reach and apply Property conveyed with Intent to defeat, delay and defraud Creditors.

In a suit in equity to reach and apply to the payment of a debt to the plaintiff, property of one corporation conveyed to another corporation in fraud of the first corporation's creditors without anything having been paid for such property and without complying with St. 1903, c. 415, it was held that such transfer of the property was a fraud upon the creditors of the first corporation, and accordingly that the property in the hands of the de-

fendant corporation could be applied in satisfaction of the debt of the principal defendant to the plaintiff creditor. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

In the same case it was pointed out that, the notes having been discounted by the trust company in good faith in the usual course of business at the request of the controlling officer and stockholder, acting in behalf of the principal defendant as its treasurer, the master was warranted in finding that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the principal defendant. *Ibid.*

To reach and apply Property fraudulently conveyed.

In a suit in equity to reach and apply to the payment of a debt to the plaintiff, property of one corporation conveyed to another corporation in fraud of the first corporation's creditors without anything having been paid for such property and without complying with St. 1903, c. 415, it was held that such transfer of the property was a fraud upon the creditors of the first corporation and accordingly that the property in the hands of the defendant corporation could be applied in satisfaction of the debt of the principal defendant to the plaintiff creditor. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

Where in a suit in equity brought by a trust company, which had discounted for the controlling officer and stockholder of a corporation which later transferred its assets to a new corporation in fraud of its creditors, three notes of the original corporation, and it was contended by the defendant new corporation that it was not liable to the trust company because the proceeds of these notes were applied by such controlling officer and stockholder to his individual business, it was said that the plaintiff trust company still was entitled to recover the amount of these notes from the defendant new corporation, because the master found that "these notes . . . were all ordinary commercial paper, with nothing in their appearance or in the circumstances surrounding their execution and negotiation to put the trust company officials on inquiry." *Ibid.*

Upon the evidence in a suit in equity under R. L. c. 159, § 3, cl. 8, by a judgment creditor of a corporation to reach and apply to the payment of the judgment debt property of the principal defendant fraudulently conveyed to a new corporation, it was held that the findings of the judge as to fraudulent intent not only were warranted but required and that the plaintiff was entitled to a decree. *Schurman v. Improved Plastic-Slate Roofing Co.* 499.

To redeem from Mortgage.

In a suit in equity by a second mortgagee to redeem the real estate from a first construction mortgage, where it appeared that the first mortgagee was to advance an agreed sum of money in instalments, and the mortgagor orally agreed with the first mortgagee, in consideration of his promise to make the loan, to pay him a bonus of an agreed amount, it was held that the bonus was not a mere gratuity but that the contract for its payment was a valid one and that, in order to redeem the property, the plaintiff must pay to

the first mortgagee the amount of the bonus in addition to the amount of money advanced by the first mortgagee. *Kempton v. Boyle*, 579.

To redeem from Sale of Personal Property by Pledgee.

In a suit in equity by a corporation to set aside a sale by the defendant of bonds pledged by the plaintiff to secure the payment of a note of the plaintiff, in which it appeared that the defendant, acting under a power of sale granted by the terms of the note, had sold the bonds held as collateral at public auction and bought them himself for \$15, it was held that the evidence as to good faith of the defendant was such as to warrant the finding of the judge dismissing the bill. *Winchester Rock & Brick Co. v. Murdough*, 50.

To review Order of Public Service Commission.

The jurisdiction given to the Supreme Judicial Court by St. 1913, c. 784, § 27, in equity to review, annul, modify or amend any rulings or orders of the public service commission extends to an order made by that commission in regard to the consolidation of the railroad companies constituting the Boston and Maine Railroad system and the reorganization of that system under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323. *Brown v. Boston & Maine Railroad*, 502.

To restrain Actions at Law.

In a suit in equity, by one as the surviving executor of the will of his father and also as devisee under that will against his brother, to enjoin the further prosecution by the defendant of an action at law on an agreement in writing executed by the plaintiff's testator about seventeen years before his death, it was held that, by accepting the benefits of the will, the defendant had elected to ratify the will and thereby had lost his right to enforce the provisions of the earlier contract which would prevent its operation, and that the plaintiff was entitled to an injunction restraining the defendant from further prosecuting his action at law. *Noyes v. Noyes*, 55.

It also was held in the case above stated, that a denial in the action at law of a motion of the present plaintiff as one of the executors, for a new trial in which to set up the principle of election, did not affect the plaintiff's individual right to relief in the present suit. *Ibid*.

Trusts.

See TRUST.

Of Suit between Foreign Corporations as to Lands in another State.

The courts of this Commonwealth will not take jurisdiction of a suit in equity between two mining corporations, both organized in another State and operating adjoining mines in still another and distant State, which involves the title of the plaintiff to the mines alleged to belong to it. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.* 522.

The courts of this Commonwealth will not take jurisdiction of a suit in equity between two mining corporations, both organized in another State and operating adjoining mines in still another and distant State where the plaintiff's alleged right to relief depends on the enforcement of a statute of the distant State, concerning common drainage of adjoining mines. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 522.

Contempt.

A decree for the plaintiff in a suit in equity in our Superior Court to enforce a decree of a New Jersey court of chancery ordering a husband to pay a certain sum of money to his wife, the plaintiff, for her separate maintenance, may be enforced by proceedings in contempt, although the decree of the Superior Court merely directs that a certain sum of money be paid to the plaintiff by the defendant and that execution issue therefor. *White v. White*, 39.

Equitable Lien.

Where creditors of a contractor brought a suit in equity against him and the city with which he had made a contract which provided that the city might retain out of any money due the contractor such sums as the director of public works should direct as being required "to settle claims for materials or labor furnished for carrying on the contract," of which notice should have been filed as there provided, it was held that the plaintiffs' claims, being for compensation for carts and their drivers, were not claims for "materials or labor furnished" and therefore that the plaintiffs were not entitled to the benefit of any part of the money retained by the city under the contract. *Loonie v. Wilson*, 420.

In the case above described it also was held that the plaintiffs were not entitled to share in the fund retained by the city in case they could prove the separate value of the labor of the drivers furnished by them, because there was no debt of the contractor to pay such sums separately. *Ibid.*

Review.

The right given by R. L. c. 193, §§ 15-19, to have final judgment in civil actions reviewed and vacated is limited to proceedings in courts of common law and does not apply to a decree of the Superior Court made under the workmen's compensation act. *Sterling's Case*, 485.

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record, if it appears that the court had no jurisdiction of the case under the workmen's compensation act. *Sterling's Case*, 485.

EQUITY PLEADING AND PRACTICE.

Parties.

In a suit in equity by the survivor of three parties who jointly furnished the consideration for the purchase of certain real estate, title to which was taken

Equity Pleading and Practice (continued).

in the name of the other two, in which the heirs at law of the other two were defendants, it was held that a motion by the defendants, for leave to amend their answer by setting up the claim that the transaction was one of a partnership, rightly was denied, and a demurrer to a cross bill by the defendants against the plaintiff to quiet the title to the real estate and for an accounting rightly was sustained, because the parties to enforce a partnership claim or a claim to an accounting would be the personal representatives and not the heirs of the deceased associates. *Magee v. Magee*, 341.

Under the circumstances it was held that where three persons were equal owners of certain securities which by agreement among them were exchanged for certain real estate in Montana, the title being taken in the name of two of them at the request of the third, such third party, by a bill in equity might enforce a resulting trust in a one third undivided interest in the real estate and compel a conveyance to him of such interest. *Ibid.*

Where a bankrupt is a nominal party to a suit in equity in which he is represented by his trustee in bankruptcy and prevails in the suit, the costs to which he would be entitled if a real party in interest should be awarded to his trustee in bankruptcy. *Loonie v. Wilson*, 420.

Cross Bill.

In a suit in equity by the survivor of three parties who jointly furnished the consideration for the purchase of certain real estate, title to which was taken in the name of the other two, in which the heirs at law of the other two were defendants, it was held that a demurrer to a cross bill by the defendants against the plaintiff to quiet the title to the real estate and for an accounting rightly was sustained. *Magee v. Magee*, 341.

Relief against the plaintiff in a suit in equity, which is sought in the defendant's answer, cannot also be made the subject of a cross bill afterwards filed. *Ibid.*

Amendment.

Upon failure and neglect of a trustee under a separation agreement of a husband and wife, to enforce the agreement for the benefit of the wife, the wife is entitled to have the agreement enforced, and should have leave to amend a bill brought by her in her own name against her husband by substituting the name of the trustee as plaintiff and then the decree should be affirmed. *Proctor v. Lombard*, 213.

Answer.

In a suit in equity by the survivor of three parties who jointly furnished the consideration for the purchase of certain real estate, title to which was taken in the name of the other two, in which the heirs at law of the other two were defendants, it was held that a motion by the defendants, for leave to amend their answer by setting up the claim that the transaction was one of a partnership, rightly was denied. *Magee v. Magee*, 341.

Relief against the plaintiff in a suit in equity, which is sought in the defendant's answer, cannot also be made the subject of a cross bill afterwards filed. *Ibid.*

Contempt Proceedings.

A decree of a court of chancery of New Jersey will be enforced as a foreign judgment here, but the plaintiff cannot insist that the same method of enforcement be used here as the one provided in the decree in New Jersey for enforcement there. *White v. White*, 39.

Master.

On an appeal from a final decree in a suit in equity where objections were filed to the report of a master but no exceptions founded on them were filed, the evidence not being reported, it was pointed out that the master's finding of fact must be taken as true and that the only question was whether the final decree was warranted on the pleadings and the findings of the master. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

Facts, in a suit in equity which were referred to a master, upon which it was held that there was no error in the refusal of the single justice in refusing the defendant's motion that the master be instructed to make additional findings and report the evidence. *Magee v. Magee*, 341.

Where an interlocutory decree is entered overruling exceptions to a master's report and confirming the report, from which no appeal is taken, and a final decree then is entered dismissing the bill, from which the plaintiff appeals, the exceptions to the report cannot be considered, under R. L. c. 159, § 26, if it does not appear that the final decree is erroneously affected by the interlocutory decree. *Fay v. Corbett*, 403.

Decree.

In a suit in equity to enforce an assignment by a contractor to a subcontractor, a proper decree is one directing the owner to pay to the subcontractor the amount of the order with interest from the filing of the bill, and, where the contractor was adjudicated a bankrupt, to pay the balance of the debt due to the contractor to his trustee in bankruptcy. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

A decree of a court in chancery of New Jersey will be enforced as a foreign judgment here, but the plaintiff cannot insist that the same method of enforcement be used here as the one provided in the decree in New Jersey for enforcement there. *White v. White*, 39.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

Findings of fact, without a report of the evidence, by a master to whom was referred a suit in equity to compel the return to the plaintiff of certain shares of the capital stock of a corporation, alleged to have been transferred by

the plaintiff to the defendant under the provisions of an oral contract broken by the defendant for the financing of the corporation, were held not to be open to review on appeal from a decree dismissing the bill. *Fay v. Corbett*, 403.

Where an interlocutory decree is entered overruling exceptions to a master's report and confirming the report, from which no appeal is taken, and a final decree then is entered dismissing the bill, from which the plaintiff appeals, the exceptions to the report cannot be considered, under R. L. c. 159, § 26, if it does not appear that the final decree is erroneously affected by the interlocutory decree. *Ibid.*

Circumstances concerning an appeal from a final decree of the Superior Court, by reason of which it was held "with some hesitation" that this court could not say that no facts could have existed which would have warranted the Superior Court in coming to the conclusion that in case the appeal was completed by a certain date, which was two months and fifteen days after it was taken, it would be completed within the time specified in St. 1911, c. 284, § 1. *Loonie v. Wilson*, 420.

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record, if it appears that the court had no jurisdiction of the case under the workmen's compensation act. *Sterling's Case*, 485.

In the case above described it was said that, as the decree must be vacated for error on the face of the record, it was not necessary to determine whether the insurer could maintain a bill in equity to enjoin the enforcement of the void decree. *Ibid.*

A rescript of this court not followed by a final decree of the trial court cannot be set up as *res judicata*. *Renwick v. Macomber*, 530.

Appeal.

Where in a suit in equity objections were filed to the report of a master but no exceptions founded on them were filed and the case came before this court on an appeal from a final decree, the evidence not being reported, it was pointed out that the findings of the master must be taken as true and that the only question was whether the final decree was warranted on the pleadings and the findings of the master. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

Findings of fact, without a report of the evidence, by a master to whom was referred a suit in equity to compel the return to the plaintiff of certain shares of the capital stock of a corporation, alleged to have been transferred by the plaintiff to the defendant under the provisions of an oral contract broken by the defendant for the financing of the corporation, were held not to be open to review on appeal from a decree dismissing the bill. *Fay v. Corbett*, 403.

Where an interlocutory decree is entered overruling exceptions to a master's report and confirming the report, from which no appeal is taken, and a final decree then is entered dismissing the bill, from which the plaintiff appeals, the exceptions to the report cannot be considered, under R. L.

c. 159, § 26, if it does not appear that the final decree is erroneously affected by the interlocutory decree. *Fay v. Corbett*, 403.

When in a suit in equity an order is made in the Superior Court that an appeal to this court shall be dismissed for want of prosecution unless it is entered in the clerk's office within ten days, the jurisdiction of the Superior Court is not brought to an end by the expiration of the ten days and, until the Superior Court has dismissed the petition on proof of the fact that the appeal was not entered within the ten days, that court has jurisdiction of the case and although the ten days have expired can extend the time for entering the appeal. *Loonie v. Wilson*, 420.

Circumstances concerning an appeal from a final decree of the Superior Court, by reason of which it was held "with some hesitation" that this court could not say that no facts could have existed which would have warranted the Superior Court in coming to the conclusion that in case the appeal was completed by a certain date, which was two months and fifteen days after it was taken, it would be completed within the time specified in St. 1911, c. 284, § 1. *Ibid*.

Reservation.

Where, upon the reservation for the determination of this court of a suit in equity for specific performance of an agreement to buy real estate which the plaintiff as mortgagee had purchased at the foreclosure sale, it appeared that the plaintiff alleged that no person in the military service of the United States had any interest in the premises, and no evidence on that issue was presented, it was held that the suit must stand for a hearing of the question of fact, whether any person in the military service of the United States had any interest in the premises in question. *Morse v. Stober*, 223.

Costs.

Where a bankrupt is a nominal party to a suit in equity in which he is represented by his trustee in bankruptcy and prevails in the suit, the costs to which he would be entitled if a real party in interest should be awarded to his trustee in bankruptcy. *Loonie v. Wilson*, 420.

ESTATES OF DECEASED PERSONS.

The tax imposed by U. S. St. 1916, c. 463, § 201 (39 U. S. Sts. at Large, 777), as amended by U. S. St. 1917, c. 159, § 300 (39 U. S. Sts. at Large, 1002), and U. S. St. 1917, c. 63, § 900 (40 U. S. Sts. at Large, 324), is an estate tax and not a legacy or succession tax, and where the will of a testator makes no provision in regard to its payment, it must be paid out of the residue of his estate. *Phunkett v. Old Colony Trust Co.* 471.

ESTOPPEL.

Where in an action for damages resulting from the eviction of the plaintiff, it appeared that the agent for the owner assured the plaintiff that his sublease was "all right" and that, relying on that assurance, the plaintiff thereafter paid rent and made repairs, it was held that the defendant was not thereby

estopped to rely on the statute of frauds and to refuse to be bound by the oral assurance of the agent. *Podren v. Macquarrie*, 127.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

A landowner by accepting material after the original contractor had become incapable of completing the contract and long after the date fixed by the contract for completing the work, is not estopped to object to the sufficiency of the original notice recorded long before that time by the contractor in an attempted compliance with the requirement of St. 1915, c. 292, and St. 1916, c. 306, as to mechanic's lien proceedings. *Pratt & Forrest Co. v. Strand Realty Theatre Co. of Lowell*, 314.

EVIDENCE.

Judicial Notice.

Upon a report by a judge of the Superior Court for determination of the correctness of a ruling by him overruling a plea in abatement to an action of contract begun on April 6, 1918, against the New York, New Haven, and Hartford Railroad Company, it was said that this court will take judicial notice of the date and of certain provisions of "General Order 18-A, signed by W. G. McAdoo, Director General of Railroads," although they are not included in the record nor called to the court's attention by the counsel for the parties. *West v. New York, New Haven, & Hartford Railroad*, 162.

Judicial notice will be taken of the provisions of the proclamation of the President of the United States, issued on December 26, 1917, appointing a director general of railroads under the joint resolutions of Congress of April 6 and December 7, 1917, and the first section of the act of Congress approved August 29, 1916 (U. S. St. 1916, c. 418, § 1). *Ibid.*

Presumptions and Burden of Proof.

In an action against a physician and surgeon for personal injuries alleged to have been due to malpractice, it was held that the liability of the defendant was not to be determined by the jury upon consideration of contingent, speculative or possible results of an operation which might have been performed upon the plaintiff, to remedy or mitigate the consequences of an injury to the nerves, but only upon proof by a fair preponderance of evidence that it was reasonably probable that such a favorable result would have followed such an operation. *Tucker v. Stetson*, 81.

In an action against the surety on a poor debtor's recognizance the burden is

on the plaintiff to show that there has been a breach of the recognizance. *McKeon v. Briggs*, 99.

If the true import and meaning of an instrument in writing cannot be determined from its language, it will be construed most strongly against the party using the uncertain language. *New York Central Railroad v. Stoneman*, 258.

Upon facts found by the master, in a suit in equity by a street railway corporation, to establish a resulting trust in a parcel of land, it was held that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff or those under whom it claimed. *Boston & Northern Street Railway v. Goodell*, 428.

Evidence in an action against a street railway company for injuries alleged to have been caused by the collision of an express car operated negligently by the servants of the defendant with a motor car driven by the plaintiff, upon which it was held that it was right for the presiding judge to refuse to make a ruling that the plaintiff was in the exercise of due care and that the defendant was negligent. *Morrissey v. Connecticut Valley Street Railway*, 554.

It usually cannot be ruled as matter of law that a burden of proof has been sustained. *Ibid.*

Applications of the doctrine, *res ipsa loquitur*, see appropriate subtitle under NEGLIGENCE.

Admissions.

At the trial of an issue as to whether an entire instrument, alleged to be a will, was procured to be executed by fraud or undue influence, evidence as to relations of the decedent and a woman, one of the beneficiaries under the will, about twenty-five years before the death of the decedent, offered before the woman had testified, is not admissible to affect her credibility, nor as an admission affecting the validity of the will. *Old Colony Trust Co. v. Di Cola*, 119.

The mere facts, that a landlord at the request of the tenant made repairs upon the demised premises from time to time, and that, about one month previous to an injury, the condition of a certain platform had been called to the attention of the landlord, who had employed a carpenter to look the platform over, does not constitute an admission of responsibility on the part of the landlord for the injury. *Conahan v. Fisher*, 234.

In a suit in equity, by a street railway corporation, against one who had been an officer of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in certain land, it appeared that the consideration for the purchase of the property was not furnished by the defendant and that the property always had been treated as belonging to the plaintiff, and that returns filed with State officers and sworn to by the defendant contained a statement that the land was "owned by the company, needed in operating road," and it was held the evidence warranted a finding by the master that the land was owned lawfully by the company and was not held *ultra vires*. *Boston & Northern Street Railway v. Goodell*, 428.

Evidence (continued).

Upon facts found by the master in a suit in equity by a street railway corporation to establish a resulting trust in a parcel of land, it was held that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff.

Boston & Northern Street Railway v. Goodell, 428.

Upon facts found by a master in a suit in equity by a street railway corporation against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land, it was held that the entries upon the books of the plaintiff and the returns made to the railroad commissioners by the defendant as an officer were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners. *Ibid.*

Where the plaintiffs in their brief in a suit in equity to review an order of the public service commission in regard to a consolidation of railroad companies and the reorganization of a railroad system declined to discuss the validity of an "alleged debt" of \$13,306,000, which was to be paid under the plan of reorganization, further than to restate their previous contentions, and the record discloses evidence sufficient to determine the validity of this indebtedness, it was held that this equivocal position of the plaintiffs was not to be treated as an admission or a waiver, and the court proceeded to decide the question. *Brown v. Boston & Maine Railroad*, 502.

Competency.

Upon the facts which appeared at the trial of an issue as to whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental diseases. *Old Colony Trust Co. v. Di Cola*, 119.

In this Commonwealth, only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent to give their opinions as to the testator's mental condition. *Ibid.*

An attorney who drew a will and was present when it was executed, but who was not a subscribing witness, may be permitted to state that he did not hear the testator say or do anything which indicated that he was not of sound mind. *Ibid.*

Further instructions of the judge at the same trial, to the effect that statements in the divorce libel of the reputed wife of the testator, which were contradictory to statements made by her on the stand, were not to be considered by the jury as evidence of their own truth or falsity, but were to be considered only as affecting the credibility of the witness, were held not to be erroneous. *Ibid.*

At the trial of an action of tort for damages sustained by the city treasurer of Lowell by reason of his unauthorized removal from office by vote of the municipal council, testimony of agents of various bonding companies, tend-

ing to show that the refusal of the companies to furnish a bond to the plaintiff was due to the incidents connected with the litigation attendant upon the plaintiff's removal and reinstatement, was competent. *Stiles v. Municipal Council of Lowell*, 174.

Where at the trial above described, it appeared that the defendants had contended that they were justified in removing the plaintiff from office because he had left large sums of the city's money on deposit with a certain bank in preference to other banks and had failed to collect sums due to the city from that bank as interest on daily balances, it was held that testimony of the plaintiff was admissible tending to refute the defendants' contention that the plaintiff's mental suffering was caused, not by their wrongful action in removing him, but by the controversy as to the relations between the plaintiff and the bank in question. *Ibid.*

Returns made by the petitioner under St. 1909, c. 490, Part I, § 41, showing a valuation upon its real estate, introduced in evidence at a hearing on petitions filed in the Superior Court appealing from refusals of the assessors of taxes of the town of Belmont to abate taxes assessed upon property used to conduct the McLean Hospital, were held not to have been inadmissible. *Massachusetts General Hospital v. Belmont*, 190.

At the trial of an action of tort against the owner of a tenement by the wife of a tenant for personal injuries, testimony of the agent in charge of the premises for the defendant, to the effect that after the accident he made certain repairs, was held to have been admitted properly for the purpose of showing that the defendant had control of the cellar where the injury occurred. *Crudo v. Milton*, 229.

At the trial of an action for the breach of contract by a corporation, which was a distributor of moving picture films, to furnish to the plaintiff and to license him to exhibit at his theatre a certain number of films, it was held that the evidence introduced by the plaintiff as to his receipts before and during the period which the contract was to have covered and as to the patronage enjoyed by a competitor of the plaintiff who was exhibiting the defendants' films in the same neighborhood, was competent to give the jury a satisfactory basis on which to find substantial damages. *Orbach v. Paramount Pictures Corp.* 281.

Evidence of the intent of a son to send to his mother a part of his wages for her support held to be admissible at a hearing before a single member of the Industrial Accident Board of a claim by a mother for compensation for the death of her son brought under the workmen's compensation act, for the purpose of proving her partial dependency, was admissible. *Freeman's Case*, 287.

Where at the trial of an action by the administrator of the estate of the wife of a tenant at will of a dwelling for conscious suffering and death of the wife caused by the giving way of a railing of a piazza, evidence tending to show that throughout the district where the dwelling in question was, there was a custom that it was the duty of the landlord to make repairs upon the railings of piazzas which were a part of the premises let, was held to be inadmissible. Following *Conahan v. Fisher*, ante, 234. *Bergeron v. Forest*, 392.

Upon facts found by the master in a suit in equity by a street railway corporation, against one who had been the president of the immediate predecessor

Evidence (*continued*).

in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land, it was held that the entries upon the books of the plaintiff and the returns made to the railroad commissioners by the defendant as an officer were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners. *Boston & Northern Street Railway v. Goodell*, 428.

In the same case it was held that the entries upon the books of the plaintiff and the returns made to the railroad commissioners were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners. *Ibid.*

In the same case it was held that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff or those under whom it claimed. *Ibid.*

Evidence offered and excluded, at the trial of an action for rent alleged to be due under a lease in writing, tending to show a surrender of the lease and an eviction, which, it was held, should have been admitted. *Reidy v. Kennedy*, 514.

At a second trial of an action for rent where the defence alleged is eviction and surrender of the lease, evidence offered by the defendant to prove such eviction and surrender by the same facts testified to at the former trial, on which the trial judge found that there was no eviction and no accepted surrender, is not to be excluded as *res judicata*, no final judgment having been entered. *Ibid.*

In the same case it was held that evidence that no attempt was made by the former owners to collect rent from the defendant after a certain date was admissible. *Ibid.*

In the same case it was held that certain evidence, which was not admissible to prove the surrender of the lease, was admissible for another purpose for which it was offered. *Ibid.*

In the action above referred to, a letter of one of the original lessors written after the sale and conveyance of the property, when he no longer was one of the owners, was held not to be competent evidence. *Ibid.*

In an action against a street railway company for injuries, it was held that the admission of testimony of the motorman as to the distance at which his car could have been heard on the night of the collision could not be held to be harmfully erroneous. *Morrissey v. Connecticut Valley Street Railway*, 554.

Evidence of a certain statement of an employee of the defendant, given at the trial of an action for personal injuries caused by the plaintiff being struck by an iron washer thrown from a window of the defendant's building, was held incompetent as against the defendant as not being within the scope of the authority of the employee who made it, but, having been admitted without objection, it was held that it should be given its probative force. *Douglas v. Holyoke Machine Co.* 573.

Relevancy and Materiality.

Where at the trial of an issue as to the validity of a will, after a woman, reputed to be the wife of the testator, had testified that the testator both before and after she had procured a divorce from her husband, had promised to marry her, she was asked if the ground of her divorce was the desertion of her husband, and it was held that the testimony properly was excluded, as being irrelevant. *Old Colony Trust Co. v. Di Cola*, 119.

Testimony at the same trial of the attorney who procured the divorce of the woman from her former husband, except wherein it tended to contradict testimony previously given by the woman, was held properly to have been excluded. *Ibid.*

In an action of tort for personal injuries evidence of the plaintiff's habits in the excessive use of intoxicating liquor may be relevant and admissible upon the issue of damages, where carefully confined to that issue by the presiding judge. *Morrissey v. Connecticut Valley Street Railway*, 554.

Remoteness.

At the trial of an issue as to whether an entire instrument, alleged to be a will, was procured to be executed by fraud or undue influence, evidence as to relations of the decedent and a woman, one of the beneficiaries under the will, about twenty-five years before the death of the decedent, offered before the woman had testified, is not admissible to affect her credibility, nor as an admission affecting the validity of the will. *Old Colony Trust Co. v. Di Cola*, 119.

At the trial of the issue above described, the judge in his discretion may exclude as too remote events in the life of a son of the woman, reputed to be the wife of the decedent, occurring twenty-four years before the death of the decedent, as well as occurrences at the decedent's home six years before his death. *Ibid.*

Extrinsic affecting Writings.

Although it appeared at the trial of a suit in equity by a railroad company, lessees of a part of a building, to compel the landlord to furnish heat on nights and holidays and Sundays, that there was a custom in Boston of heating office buildings from eight o'clock in the morning to six o'clock in the evening unless the lease called for heat beyond those hours, it was held that it could not be ruled as a matter of law that the lessee was not entitled to have the premises heated twenty-four hours of every day, where it also appeared that it was necessary for the proper operation of the plaintiff's railroad to use the premises on holidays, Sundays and at night. *New York Central Railroad v. Stoneman*, 258.

There was no provision in the lease, above described, as to the part of the day or week during which the demised premises should be kept heated, and it was held that in that respect the lease was ambiguous, so that extrinsic evidence was admissible to show what was the intention of the parties upon that question. *Ibid.*

In the suit above described it was held that evidence that the original lessor continued to be the owner of the building for five months, during which he kept the building heated at all hours of every day, including Sundays and

Evidence (continued).

holidays, and that, after the defendant became owner, his agent without objection continued so to furnish heat for nine months more, was admissible to show the construction put upon the ambiguous provision of the lease by the parties themselves, and that their interpretation as shown by their conduct was of great importance in determining the meaning that the parties intended should be given to that provision. *New York Central Railroad v. Stoneman*, 258.

If a reading of the whole of a testator's will produces a conviction that he must necessarily have intended the giving of an interest which is not given by express and formal words or the denial of a benefaction which is not manifested by an apt phrase, the defect must be supplied by implication and the language used by the testator so moulded as to carry into effect so far as possible the intention which by his whole will he has sufficiently declared. *Lamb v. Jordan*, 335.

Where the meaning of a will is not ambiguous, extrinsic evidence is not admissible upon the question of the testator's intent. *Ibid.*

At the hearing of a suit in equity, seeking to compel the return to the individual plaintiffs of certain shares of stock of the corporation plaintiff alleged to have been transferred to the defendant under the terms of an oral contract, oral evidence, tending to show that the actual consideration for the making by the defendant of a certain agreement in writing was the transfer to the defendant by the plaintiff of the shares of stock which the plaintiff by the suit was seeking to have returned to him, was held to be admissible, where the agreement made no statement whatever as to the transfer of those shares, but mentioned only certain shares which were transferred to the defendant as collateral. *Fay v. Corbett*, 403.

Where in an action against the surety on a common law bond given to secure the release of one arrested on mesne process, it appeared that the defendant surety offered to show that, before signing the bond, she said in substance that she did not in any way desire to make herself liable for the judgment, and the trial judge excluded the evidence, it was held that the exclusion was right, as the defendant surety could not thus control or vary the obligation of the contract in writing. *Graves v. Apt*, 587.

In the same case it was held that the circumstances under which the contract was executed and the facts to which it related could be considered in order to apply the words "shall not avoid" in accordance with the intention of the parties. *Ibid.*

Opinion: Experts.

Upon the facts which appeared at the trial of an issue as to whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental diseases. *Old Colony Trust Co. v. Di Cola*, 119.

Only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent, in this Commonwealth, to give their opinion as to the testator's mental condition. *Ibid.*

Where, at a hearing before a master, in a probate appeal where the validity of a marriage in the State of Rhode Island was in issue, certain sections of a statute of Rhode Island were put in evidence which never had been construed by the courts of that State, and the opinion of a member of the bar of Rhode Island, who testified as an expert as to the correct construction of the statute, was the only evidence on the subject except the statute itself, it was held that the master had the right to disregard the testimony of the expert and to form his own opinion as to the legal effect of the statute. *Martin v. Otis*, 491.

Admitted without Objection.

Certain evidence, admitted without objection, which, it was pointed out, was entitled to be given its probative force, even if it were incompetent. *Knowles v. Boston Elevated Railway*, 347.

Evidence of a certain statement of an employee of the defendant given at the trial of an action for personal injuries caused by the plaintiff being struck by an iron washer thrown from a window of the defendant's building was held incompetent as against the defendant, as not being within the scope of the authority of the employee who made it, but, having been admitted without objection, it was held that it should be given its probative force. *Douglas v. Holyoke Machine Co.* 573.

Book Entries.

Upon facts found by the master in a suit in equity by a street railway corporation against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land, it was held that entries upon the books of the plaintiff and the returns made to the railroad commissioners by the defendant as an officer were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners. *Boston & Northern Street Railway v. Goodell*, 428.

Corporation Returns to State Officers.

Returns made by the petitioner under St. 1909, c. 490, Part I, § 41, showing a valuation upon its real estate, introduced in evidence at a hearing on petitions filed in the Superior Court appealing from refusals of the assessors of taxes of the town of Belmont to abate taxes assessed upon property used to conduct the McLean Hospital were held not to have been inadmissible. *Massachusetts General Hospital v. Belmont*, 190.

In a suit in equity, by a street railway corporation against one who had been an officer of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in certain land, it appeared that returns filed with State officers and sworn to by the defendant contained a statement that the land was "owned by the company, needed in operating road," and it was held the evidence to warrant a finding by the master that the land was owned lawfully by the company and was not held *ultra vires*. *Boston & Northern Street Railway v. Goodell*, 428.

Evidence (continued).

Upon facts found by a master in a suit in equity by a street railway corporation against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land, it was held that entries upon the books of the plaintiff and returns made to the railroad commissioners by the defendant as an officer were admissible upon the issues whether the defendant claimed any beneficial interest in the property or whether he recognized the plaintiff and its predecessors as its equitable owners. *Boston & Northern Street Railway v. Goodell*, 428.

Foreign Law.

Where, at a hearing before a master, in a probate appeal where the validity of a marriage in the State of Rhode Island was in issue, certain sections of a statute of Rhode Island were put in evidence which never had been construed by the courts of that State, and the opinion of a member of the bar of Rhode Island who testified as an expert as to the correct construction of the statute, was the only evidence on the subject except the statute itself, it was held that the master had the right to disregard the testimony of the expert and to form his own opinion as to the legal effect of the statute. *Martin v. Otis*, 491.

✓ The conclusion of a master appointed by the Probate Court, that a marriage in Rhode Island which was irregular according to one section of the statute of Rhode Island, under another section of the same statute, if otherwise valid, was valid in spite of such irregularity, was held to have been correct. *Ibid.*

In Rebuttal.

Where, in direct examination of the plaintiff's driver at the trial of an action of tort against a street railway for damages to the plaintiff's horse and wagon, he had testified that the street car struck his left rear wheel, an exception to a refusal to permit the same witness to be asked in rebuttal whether the street car struck the front of the wagon must be overruled, the subject matter of the question being a part of the plaintiff's case in chief and its exclusion in rebuttal being a matter of discretion. *McNeil v. Middlesex & Boston Street Railway*, 254.

Judicial Record.

In an action against the surety on a poor debtor's recognizance, where the record in the poor debtor proceedings shows that the debtor delivered himself up for examination in accordance with R. L. c. 168, § 30, on a day within thirty days from the day of his arrest, and gave notice of his desire to take the oath for the relief of poor debtors, this record is conclusive and binding upon the parties and cannot be contradicted or controlled by extrinsic evidence. *McKeon v. Briggs*, 99.

In such an action, where the record of the poor debtor proceedings shows that the debtor within thirty days from the day of his arrest personally appeared in court and made the application to take the oath, the plaintiff cannot be permitted to testify that the debtor told him that he never had been in the poor debtor session before the day finally fixed for the hearing. *Ibid.*

Of Adverse Possession.

Upon facts found by a master in a suit in equity by a street railway corporation to establish a resulting trust in a parcel of land, it was held that the payment by the plaintiff and its predecessors of the taxes on the land was admissible to show that the defendant did not hold the title to the land as owner and that he never claimed to hold adversely to the plaintiff or those under whom it claimed. *Boston & Northern Street Railway v. Goodell*, 428.

Of Agency.

Where in an action by the owner of furniture against the proprietor of a warehouse in which the furniture was stored, for a conversion of a part of the goods, it was held, that the defendant, before delivering all the plaintiff's goods to an alleged agent of the plaintiff, was bound to ascertain the nature and extent of his authority. *Blaisdell v. Hersum & Co. Inc.* 91.

In the case above described it also was held that the acts and declarations of the agent plainly were incompetent to prove his authority or the extent of it. *Ibid.*

Of Assent.

Where at the trial of an action for damages resulting from eviction of the plaintiff there was evidence that the agent in charge of the premises for the owner, had dealt with the plaintiff's lessor as lessee of the owner, it was held insufficient to show that the original lessee had made an assignment from himself as an individual to himself as a trustee which had been assented to in writing by the owner. *Podren v. Macquarrie*, 127.

Of Consent or Authority.

Where it appeared at the hearing of a petition for the establishment of a mechanic's lien under R. L. c. 197, that two who were tenants in common agreed in writing to sell real estate and, previous to the making of the agreement the prospective purchaser made a contract for repairing the premises and was permitted by the owners to take possession of the premises so that the mechanics might do their work, it was held, that the foregoing facts alone did not warrant a finding that the agreement of the prospective purchaser with the petitioner was made by consent of the owners or of a person rightfully acting for them in procuring or furnishing such labor or materials. *Roxbury Painting & Decorating Co. v. Nute*, 112.

Where at the same trial, it appeared merely that the tenant in common who agreed with the prospective purchaser to the modification of the agreement had control and management of the real estate for herself and her cotenant, and that she had told her cotenant of the progress of the repairs on the premises, it was held, that a finding was not warranted that the absent tenant in common had consented to the modification of the agreement between the petitioner and the prospective purchaser for the repairs on the premises. *Ibid.*

In the same case it was held that the question, whether the tenant in common who agreed to such a modification of the contract as to permit the prospective purchaser to take immediate possession of the premises for the purpose of having the repairs in question made consented to the making of the

Evidence (*continued*).

contract between the prospective purchaser and the petitioner, was for the jury. *Roxbury Painting & Decorating Co. v. Nute*, 112.

Of Conduct of Parties to Contract.

In a suit against a mortgagee of premises subject to a lease, who had agreed to be bound by the provisions of the lease if he foreclosed his mortgage, and who had so foreclosed, it was held that evidence of the conduct of the original lessor and the defendant was admissible to show the construction put upon an ambiguous provision of the lease as to heating by the parties themselves. *New York Central Railroad v. Stoneman*, 258.

Of Custom.

In an action by a member of the family of a tenant at will of one floor of a three-tenement building against the landlord for personal injuries resulting from the breaking of a railing which was a part of the demised premises, it was held that a custom was not admissible in evidence to the effect that the owner should make necessary repairs and keep the property tenantable and in safe condition. *Conahan v. Fisher*, 234.

Where, at the trial of an action by the administrator of the estate of the wife of a tenant at will of a dwelling against the landlord for conscious suffering and death of the wife caused by the giving way of a railing of a piazza, evidence tending to show that throughout the district where the dwelling in question was, there was a custom that it was the duty of the landlord to make repairs upon railings of piazzas which were a part of the premises let, was held to be inadmissible. Following *Conahan v. Fisher*, *ante*, 234. *Bergeron v. Forest*, 392.

Of Damages.

Where, at the trial of an action of tort for damages to a horse and wagon, the property of the plaintiff, caused by collision with a street car, the plaintiff was permitted to testify as to the value of his property before and after the collision, he is not harmed by not being permitted to ask his driver how much the horse depreciated in value because of the collision nor by not being permitted himself to testify how much a new horse cost. *McNeil v. Middlesex & Boston Street Railway*, 254.

Of Gratuitous Agreement.

Evidence at the trial of an action for death and conscious suffering of a tenant's wife caused by the giving way of a railing of a piazza, bearing on counts in the declaration which alleged that the repairs upon the railing of the piazza were made gratuitously by the landlord, which was held to have warranted a finding of a gratuitous agreement by the defendant with the wife to make the repairs, negligence in the making of which caused her injury. *Bergeron v. Forest*, 392.

Of Intent.

Evidence of the intent of a son to send to his mother a part of his wages for her support held to be admissible at a hearing before a single member of the Industrial Accident Board of a claim by a mother for compensation for

the death of her son brought under the workmen's compensation act, for the purpose of proving her partial dependency, was admissible. *Freeman's Case*, 287.

Of Habits of Intoxication.

In an action of tort for personal injuries evidence of the plaintiff's habits in the excessive use of intoxicating liquor may be relevant and admissible upon the issue of damages, where carefully confined to that issue by the presiding judge. *Morrissey v. Connecticut Valley Street Railway*, 554.

Of Ownership of Land.

In a suit in equity, by a street railway corporation against one who had been an officer of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in certain land, it appeared that the consideration for the purchase of the property was not furnished by the defendant and that the property always had been treated as belonging to the plaintiff, and that returns filed with State officers and sworn to by the defendant contained a statement that the land was "owned by the company, needed in operating road," and it was held that the evidence warranted a finding by the master that the land was owned lawfully by the company and was not held *ultra vires*. *Boston & Northern Street Railway v. Goodell*, 428.

Of Previous Injuries.

In an action of tort for personal injuries arising from a collision, the defendant may show that the injuries attributed by the plaintiff to the collision were in fact caused by other and previous accidents, and for this purpose evidence as to other previous injuries properly may be admitted. *Morrissey v. Connecticut Valley Street Railway*, 554.

Of Soundness of Mind.

Only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent, in this Commonwealth, to give their opinions as to the testator's mental condition. *Old Colony Trust Co. v. Di Cola*, 119.

An attorney who drew a will and was present when it was executed, but who was not a subscribing witness, may be permitted to state that he did not hear the testator say or do anything which indicated that he was not of sound mind. *Ibid.*

Upon the facts which appeared at the trial of an issue as to whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental diseases. *Ibid.*

Of Value.

Returns made by the petitioner under St. 1909, c. 490, Part I, § 41, showing a valuation upon its real estate, introduced in evidence at a hearing on

Evidence (continued).

petitions filed in the Superior Court appealing from refusal of the assessors of taxes of the town of Belmont to abate taxes assessed upon property used to conduct the McLean Hospital were held not to have been inadmissible. *Massachusetts General Hospital v. Belmont*, 190.

Where, at the trial of an action of tort for damages to a horse and wagon the property of the plaintiff, caused by collision with a street car, the plaintiff was permitted to testify as to the value of the property before and after the collision, he is not harmed by not being permitted to ask his driver how much the horse depreciated in value because of the collision nor by not being permitted himself to testify how much a new horse cost. *McNeil v. Middlesex & Boston Street Railway*, 254.

- *Photographs.*

The admission in evidence of photographs rests largely in the discretion of the presiding judge. *Morrissey v. Connecticut Valley Street Railway*, 554.

Where photographs have been admitted in evidence at a trial, and later the jury take a view of the scene shown by the photographs, this does not render the photographs incompetent. *Ibid.*

Violation of Statute as Evidence of Negligence.

Upon evidence which tends merely to show that, at a certain station the cars of a street railway company were always filled with passengers at a certain hour of the day and that on a certain morning a car was so crowded that the guard "had to press the doors in," and that the pushing of the crowd thrust a passenger out of the door and caused him to fall into the street, St. 1906, c. 463, Part III, § 96, was held not to be applicable in an action against the street railway company for personal injuries received by such passenger. *Knowles v. Boston Elevated Railway*, 347.

EXECUTOR AND ADMINISTRATOR.

When an appeal is pending from a decree of the Probate Court allowing the will of an alleged testator, the Probate Court under R. L. c. 137, §§ 10, 11, may authorize a special administrator of the testator's estate to prosecute a pending suit in equity brought by the testator in his lifetime to procure a reconveyance of real estate. *Purcell v. Purcell*, 62.

The tax imposed by U. S. St. 1916, c. 463, § 201 (39 U. S. Sts. at Large, 777), as amended by U. S. St. 1917, c. 159, § 300 (39 U. S. Sts. at Large, 1002), and U. S. St. 1917, c. 63, § 900 (40 U. S. Sts. at Large, 324), is an estate tax and not a legacy or succession tax, and where the will of a testator makes no provision in regard to its payment, it must be paid out of the residue of his estate. *Plunkett v. Old Colony Trust Co.* 471.

Where the plaintiff in an action at law has attached on mesne process an undivided share of the defendant in certain real estate as an heir at law of his mother, and after the attachment and before judgment the administrator of the mother's estate sells the real estate for the payment of debts, retaining a surplus in which the defendant's share is more than sufficient to satisfy the plaintiff's claim, and where the plaintiff obtains judgment and immediately notifies the administrator of his lien and demands payment of his claim from the proceeds of the sale and within thirty days after

the judgment brings a suit in equity to enforce his rights, the plaintiff has established his lien and is entitled to payment out of the proceeds of the sale in the hands of the administrator as against a creditor claiming under a subsequent attachment. *Bartlett v. Moore*, 481.

In an appeal from a decree of the Probate Court appointing an administrator it was held upon certain findings of the master that the surviving husband, although his marriage to the intestate was lawful, was not a suitable person to administer the estate of his wife and that on this ground a decree of the Probate Court appointing him administrator of her estate should be reversed. *Martin v. Otis*, 491.

FISHING VOYAGE.

Where in an action of tort at common law against the master and owners of a fishing schooner, it appeared that the plaintiff was employed under the terms known as the "Provincetown lay," it was held that there was evidence that the plaintiff plainly was an employee and that the shares given to him and the other members of the crew did not create a partnership. *Cambra v. Santos*, 131.

FRAUD.

Evidence upon which it was held that the Probate Court has no power to vacate a decree made by that court, many years before, allowing a certain will even assuming that the executor perpetrated a fraud upon the Probate Court in procuring the allowance of the will. *Renwick v. Macomber*, 530.

In a suit in equity to reach and apply to the payment of a debt to the plaintiff property of one corporation conveyed to another corporation in fraud of the first corporation's creditors, without anything having been paid for such property and without complying with St. 1903, c. 415, it was held that such transfer of the property was a fraud upon the creditors of the first corporation; and accordingly that the property in the hands of the defendant corporation could be applied in satisfaction of the debt of the principal defendant to the plaintiff creditor. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

In the same case it was pointed out that, the notes having been discounted by the trust company in good faith in the usual course of business at the request of the controlling officer and stockholder, acting in behalf of the principal defendant as its treasurer, the master was warranted in finding that the trust company had no reason to believe that the proceeds were not to be used for the benefit of the principal defendant. *Ibid.*

Where in a suit in equity brought by a trust company, which had discounted for the controlling officer and stockholder of a corporation, which transferred its assets to a new corporation in fraud of its creditors, three notes of the original corporation, it was contended by the defendant new corporation that it was not liable to the trust company because the proceeds of these notes were applied by such controlling officer and stockholder to his individual business, it was held that the plaintiff trust company was entitled to recover the amount of these notes from the defendant new corporation. *Ibid.*

Where a corporation without payment, fraudulently conveyed its assets to a new corporation organized to receive them, it was held that the defendant new corporation, having participated actively in the fraud, could not be allowed for the amounts that it had paid to the merchandise creditors of the principal defendant, such payments having been made in pursuance of a dishonest purpose to defraud the other creditors of the principal defendant and to maintain its own credit. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

If the pledgee, in an agreement under which the pledgor consents that goods pledged as security may be sold in the event of his bankruptcy, is a corporation doing business in Boston, whose entire common stock is owned by a corporation doing business in Springfield, by which it is managed and controlled, and, acting under orders of and in combination with the Springfield corporation, upon the bankruptcy of the pledgor, for the sole purpose of benefiting the two corporations, sells and ships the pledged property to the Springfield corporation at a price below the market price and it is sold by the Springfield corporation within thirty days at a very substantial profit, such a sale to the Springfield corporation may be found to be fraudulent and voidable at the election of the pledgor and to amount to a conversion. *Whitman v. Boston Terminal Refrigerating Co.* 386.

In a suit in equity brought upon a contract which cancelled an earlier agreement it was held to be unnecessary to consider whether a certain provision of the subsequent contract was a misrepresentation of fact or whether, if a misrepresentation, it was a material one, because there was no finding by the master that the plaintiff relied upon the alleged misrepresentation. *Ross v. Burrage*, 439.

Upon the evidence in a suit in equity under R. L. c. 159, § 3, cl. 8, by a judgment creditor of a corporation to reach and apply to the payment of the judgment debt property of the principal defendant fraudulently conveyed to a new corporation, it was held that the findings of the judge as to fraudulent intent not only were warranted but required and that the plaintiff was entitled to a decree. *Schurman v. Improved Plastic-Slate Roofing Co.* 499.

FRAUDS, STATUTE OF.

Where in an action for damages resulting from eviction of the plaintiff it appeared that the agent for the owner assured the plaintiff that his sublease was "all right" and that, relying on that assurance, the plaintiff thereafter paid rent and made repairs, it was held that the defendant was not thereby estopped to rely on the statute of frauds and to refuse to be bound by the oral assurance of the agent. *Podren v. Macquarrie*, 127.

A widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the husband's alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and § 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing and an agreement to make a will also must be in writing. *Sughrus v. Barlow*, 468.

GARBAGE.

It is within the limits of the police power for a municipality to confine to a single person or corporation the collection, transportation through its streets and final disposition of garbage, which is an actual and potential source of disease and a detriment to the public health and may easily become a public nuisance. *Wheeler v. Boston*, 275.

An ordinance of the city of Boston and a regulation by the board of health, which prohibited the transporting of garbage through the public ways of the city except by the city or its contractors and their agents, were held to be justifiable as reasonable exercises of the police power. *Ibid.*

Where the officials of a city, acting in good faith under authority of an ordinance of the city, have issued a permit to collect and dispose of the city's garbage to a corporation, a petition for a writ of mandamus cannot be maintained to compel them also to issue a similar permit to another. *Ibid.*

GENERAL COURT.

General law declaratory of a scheme of public policy as to exemption from taxation may be changed by the General Court provided no constitutional guaranty is violated. *Massachusetts General Hospital v. Belmont*, 190.

GIFT.

An imperfect gift cannot be interpreted to be a declaration of trust. *Cardona v. Leveroni*, 310.

HEALTH, BOARD OF.

See BOARD OF HEALTH.

HIGHWAY.

See WAY, *Public*.

HUSBAND AND WIFE.

A widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the husband's alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and § 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing, and an agreement to make a will also must be in writing. *Sughrue v. Barlow*, 468.

An alleged will in favor of the person who after its execution became the wife and widow of the alleged testator, and who was induced to marry him by his oral promise to make a will in her favor, is revoked under R. L. c. 135, § 9, by such subsequent marriage, if it does not appear from the alleged will that it was made in contemplation of such marriage. *Ibid.*

When a man has entered into an antenuptial agreement with a woman, who becomes his wife, to give to her by will a proportional part of his estate, he cannot make gifts, either absolutely, conditionally, indirectly or otherwise, for the main purpose of defeating the provisions of the agreement

Husband and Wife (continued).

and of preventing it from operating for the wife's benefit. *Eaton v. Eaton*, 351.

Where a man and a woman undertake by an antenuptial agreement to establish their respective property rights in the estate of the first to die, the parties do not stand at arm's length toward one another, and their relation is such that they are held to reasonableness and good faith toward one another in its performance. *Ibid.*

Separation Agreement.

Where a separation agreement between a husband and his wife and a third person as a trustee provided for payments by the husband to the trustee for the benefit of the wife of \$55 per month, and the payments for a time were in the sum of \$30 per month, but there was no specific agreement on the wife's part that such payments should be accepted in full satisfaction of the requirements of the agreement, it cannot be ruled as a matter of law, in a suit in equity for the enforcement of the agreement, that the payments of less than the sum stated in the agreement were accepted as full satisfaction and not merely as part payments. *Proctor v. Lombard*, 213.

A letter by the wife to the trustee, under a separation agreement between a husband and wife and a trustee, releasing and dismissing the trustee and requesting that her "monthly allowance of Thirty Dollars," be sent to her at her home address, while it well might discharge the trustee as the wife's attorney, cannot as a matter of law be said to have terminated her rights under the agreement, especially as the wife continued to receive monthly payments from her husband. *Ibid.*

Although the agreement above described provided that the wife should not institute any action against the husband on the ground of non-support, and she, on March 7 of a year when the agreement was in force, brought in the Probate Court a petition for separate maintenance, upon which there never was a hearing and which was dismissed without prejudice by agreement of the parties on the tenth day of the next month, it was held that it could not be said as a matter of law that the wife had forfeited her rights under the agreement by the bringing of the petition in the Probate Court. *Ibid.*

Upon failure and neglect of a trustee under a separation agreement of a husband and wife, to enforce the agreement for the benefit of the wife, the wife is entitled to have the agreement enforced, and should have leave to amend a bill brought by her in her own name against her husband by substituting the name of the trustee as plaintiff and then the decree should be affirmed. *Ibid.*

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INFANT.

Under the title and provisions of the workmen's compensation act (St. 1911, c. 751, as amended) and the definition of "Employee" contained in Part V,

§ 2, of the act, a minor employee is within the provisions of the act and is bound by its terms. *Gilbert v. Wire Goods Co.* 570.

The provision contained in Part II, § 14, of the workmen's compensation act does not deprive a minor of his rights under the act or of the power to exercise them himself. *Ibid.*

INSURANCE.

Life.

Where one having a wife and children has a policy of insurance on his life payable to his legal representatives, the equitable interest in the policy of any of the persons who will be his next of kin and heirs at law in case he dies intestate is assignable during the lifetime of the insured, and if he dies intestate such assignment may be enforced in equity. *Sloan v. Breeden*, 418.

Accident.

Upon the evidence at the trial of an action on an accident insurance certificate, not to be payable "unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of the death, disability or loss," it was held that under the terms of the contract the plaintiff could not recover. *Leland v. United Commercial Travelers of America*, 558.

Assignment.

Where one having a wife and children has a policy of insurance on his life payable to his legal representatives, the equitable interest in the policy of any of the persons who will be his next of kin and heirs at law in case he dies intestate is assignable during the lifetime of the insured, and if he dies intestate such assignment may be enforced in equity. *Sloan v. Breeden*, 418.

Authority of Broker.

If an insurance company sends to an insurance broker a notice addressed to a policy holder, for whom the broker had obtained the policy, asking the insured to notify the company in case he wishes to renew his policy, this gives no authority to the broker to bind the insurance company by an oral contract of insurance or by an agreement to issue a policy. *Sheridan v. Massachusetts Fire & Marine Ins. Co.* 479.

Broker or Agent.

An insurance broker, who solicits applications for insurance and delivers them to an agent of an insurance company, which issues policies upon them, is not on these facts an agent of the insurance company. *Sheridan v. Massachusetts Fire & Marine Ins. Co.* 479.

INTENT.

Evidence of intent and state of mind, see appropriate subtitle under EVIDENCE.

INTEREST.

Payments on account of principal and interest under the provision of § 51 of the small loans act, R. L. c. 102, which it was held must be treated as payments on account of the original loan and not as independent transactions. *Koltin v. Brown*, 16.

Where a loan is secured by a pledge of collateral, with a contract containing a power of sale clause which is enforceable if, and when, the borrower makes an assignment for the benefit of creditors, the assignees of the borrower are entitled to recover from the lender in an action of contract any interest in excess of that which shall have accrued to the date of the sale of the collateral, whether such excess was prepaid or was retained from the net proceeds of the sale. *Gaston v. Boston Penny Savings Bank*, 23.

Conditions of a certain offer in writing by owners of land to a city to accept in full of damages for their land and buildings taken or injuriously affected by the proposed widening and laying out of certain streets the amounts set opposite their respective names, were held when accepted by the acts of the city, to have been valid, and it also was held that the sums named, being "in full of damages," no interest should be allowed. *King v. Springfield*, 592.

INTERSTATE COMMERCE.

An ordinance of a city entitled "Hackney Carriages, Trucks, Drays, etc.," passed under R. L. c. 25, § 24, before the enactment of St. 1916, c. 293, was held not to apply nor to be intended to apply to the use or driving of a motor vehicle devoted exclusively to the transportation of passengers for hire between a city in another State and a city in this Commonwealth, and a person engaged solely in such interstate commerce cannot be prosecuted under the ordinance for driving without a license. *Commonwealth v. O'Neil*, 535.

INTOXICATING LIQUORS.

In an action of tort for personal injuries, evidence of the plaintiff's habits in the excessive use of intoxicating liquor may be relevant and admissible upon the issue of damages, where carefully confined to that issue by the presiding judge. *Morrissey v. Connecticut Valley Street Railway*, 554.

JOINT TENANTS AND TENANTS IN COMMON.

Where at the trial of a petition for the establishment of a mechanic's lien under R. L. c. 197, against two who owned the real estate as tenants in common, it appeared that a contract for labor and materials was made with the petitioner by one who did so with the consent of one of the tenants in common, it was held that the lien might be established as to the interest of the tenant in common who consented to the making of the contract with the petitioner, and must be dismissed as to the other tenant in common. *Roxbury Painting & Decorating Co. v. Nute*, 112.

Where it appeared at the hearing of a petition for the establishment of a mechanic's lien under R. L. c. 197, that two who were owners in common

agreed in writing to sell real estate and, previous to the making of the agreement, the prospective purchaser made a contract for repairing the premises and was permitted by the owners to take possession of the premises so that the mechanics might do their work, it was held that the foregoing facts alone did not warrant a finding that the agreement of the prospective purchaser with the petitioner was made by consent of the owners or of a person rightfully acting for them in procuring or furnishing such labor or materials. *Roxbury Painting & Decorating Co. v. Nute*, 112.

In the same case, it was held that the question, whether the tenant in common who agreed to such a modification of the contract as to permit the prospective purchaser to take immediate possession of the premises for the purpose of having the repairs in question made, consented to the making of the contract between the prospective purchaser and the petitioner, was for the jury. *Ibid.*

Where at the same trial, it appeared merely that the tenant in common who agreed with the prospective purchaser to the modification of the agreement had control and management of the real estate for herself and her cotenant, and that she had told her cotenant of the progress of the repairs on the premises, it was held that a finding was not warranted that the absent tenant in common had consented to the modification of the agreement between the petitioner and the prospective purchaser for the repairs on the premises. *Ibid.*

JUDGMENT.

Where a divorce *nisi* was granted during the great war to one born in Germany, it is not open to the libellee to contend that the decree of divorce is invalid by reason of the fact that the libellant was naturalized unlawfully, the decree admitting the libellant to citizenship being conclusive as to all matters necessarily before the court that made it, and involved in the issue, and can be impeached or annulled only by a direct proceeding brought for that purpose. *Oehlert v. Oehlert*, 497.

At a second trial of an action for rent where the defence alleged is eviction and surrender of the lease, evidence offered by the defendant to prove such eviction and surrender by the same facts testified to at the former trial, on which the trial judge found that there was no eviction and no accepted surrender, is not to be excluded as *res judicata*, no final judgment having been entered. *Reidy v. Kennedy*, 514.

In a libel for divorce brought by a husband, it was held that a decree of the Probate Court on the petition of the wife for separate support, affirmed on appeal, to the effect that the husband had deserted his wife and that she was living apart from him for justifiable cause, was a bar to the maintenance of the libel. *Austin v. Austin*, 528.

Evidence upon which it was held that the Probate Court has no power to vacate a decree made by that court, many years before, allowing a certain will, even assuming that the executor perpetrated a fraud upon the Probate Court in procuring the allowance of the will. *Renswick v. Macomber*, 530.

JURISDICTION.

In an action against the surety on a poor debtor's recognizance, it was said that it was unnecessary to determine whether the creditor's counsel had waived the right to object to any want of jurisdiction in the court over the person of the debtor, because as matter of law the evidence did not warrant a finding that there had been any breach of the recognizance. *McKeon v. Briggs*, 99.

In an action at common law against the master and owners of a fishing vessel for personal injuries to a member of the crew from an explosion of gasoline while on board the vessel in Boston Harbor it was assumed, without the question being raised, that such action could be maintained in a court of the Commonwealth against the owners of the vessel, and that, his injury being a maritime tort, the workmen's compensation act has no application to it. *Cambra v. Santos*, 131.

Upon a report by a judge of the Superior Court for determination of the correctness of a ruling by him overruling a plea in abatement to an action of contract begun on April 6, 1918, against the New York, New Haven, and Hartford Railroad Company, the plea setting up in substance that under "General Order No. 18-A, signed by W. G. McAdoo, Director General of Railroads," it should have been brought either in the county of Dukes County, where the plaintiff resided, or in the State of Connecticut, where the cause of action arose, this court will take judicial notice of the date and of certain provisions of "General Order 18-A," although they are not included in the record nor called to the court's attention by the counsel for the parties. *West v. New York, New Haven, & Hartford Railroad*, 162.

It appearing that no attachment of property was made in the action above described, it was held that the bringing of the action in the county where the defendant had a usual place of business violated no federal enactment applicable to the circumstances. *Ibid.*

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record, if it appears that the court had no jurisdiction of the case under the workmen's compensation act. *Sterling's Case*, 485.

The courts of this Commonwealth will not take jurisdiction of a suit in equity between two mining corporations, both organized in another State and operating adjoining mines in still another and distant State, which involves the title of the plaintiff to the mines alleged to belong to it. *Arizona Commercial Mining Co. v. Iron Cap Copper Co.* 522.

Nor will the courts of this Commonwealth take jurisdiction of a suit in equity between the parties above described, where the plaintiff's alleged right to relief depends on the enforcement of a statute of the distant State concerning common drainage of adjoining mines. *Ibid.*

EQUITY JURISDICTION, see that title.

OF PROBATE COURT, see that title.

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

Language employed in conveyances of parcels of land, made subsequently to the recording of a plan of a tract of forty lots and four ways, which tract included the land described in such conveyances, which was held to have warranted a decree by the Land Court registering in the petitioner the unincumbered title to that part of a way indicated on the plan which lay between the land on both sides of it owned by him. *Stevens v. Young*, 304.

LANDLORD AND TENANT.

What constitutes Demised Premises.

If the second floor of a house containing a separate tenement on each floor is let to a tenant, the railing of a platform and a corner post supporting the platform, so far as within the horizontal planes bounding the second floor, are a part of the demised premises, which, unless otherwise provided by express agreement, the landlord is under no duty to keep in repair. *Conahan v. Fisher*, 234.

Assignment of Lease.

Action against the owner of a building for damages resulting from an alleged unlawful eviction of the plaintiff could not be maintained because the plaintiff's claim to a right of possession was founded upon an alleged sublease which the sublessor executed "as trustee, but not individually," whereas the original lease was to him as an individual and he never had assigned it to himself as trustee. *Podren v. Macquarrie*, 127.

Where the owners of a business building sold the building and thereby assigned to the grantee an outstanding lease of a store in the building, and the grantee leased the whole building to a new tenant for a long term, subject to the outstanding lease which he assigned to the new lessee, and the lessee under the old lease paid no rent after that time, and by agreement of the parties the grantors paid to the grantee the full amount of the rent under the old lease up to the time of its termination and the grantee paid this amount to his new lessee, it was held that the present lessee could maintain an action on the old lease against the lessee thereunder for the rent that had accrued after the lease and assignment to him, for the benefit of the grantors of the building, the lessors under the lease sued upon. *Reidy v. Kennedy*, 514.

Evidence upon which it was held that a present lessee of a building could maintain an action on an old lease against the lessee thereunder for the rent, that had accrued after the lease and assignment to him. *Ibid.*

In the same case evidence of a payment of rent by a former occupant of the store to a representative of the former owners, which was not in payment of rent that accrued after the lease and assignment, was held not to be admissible. *Ibid.*

Construction of Lease and Covenants.

A provision in a lease "that the demised premises shall be heated by the lessors to a proper warmth for office purposes," was held to relate only to the degree of heat to be furnished and not to the part of the day or week during which the building was to be heated. *New York Central Railroad v. Stoneman*, 258.

There was no provision in the lease above described as to the part of the day or week during which the demised premises should be kept heated, and it was held that in that respect the lease was ambiguous, so that extrinsic evidence was admissible to show what was the intention of the parties upon the question. *Ibid.*

In a suit against a mortgagee of premises subject to a lease, who had agreed to be bound by the provisions of the lease if he foreclosed his mortgage, and who had so foreclosed, it was held that evidence of the conduct of the original lessor and the defendant was admissible to show the construction put upon an ambiguous provision of the lease as to heating by the parties themselves. *Ibid.*

Although it appeared at the trial of a suit in equity by a railroad company, lessee of part of a building, to compel the landlord to furnish heat on nights and holidays and Sundays, that there was a custom in Boston of heating office buildings from eight o'clock in the morning to six o'clock in the evening unless the lease called for heat beyond those hours, it was held that it could not be ruled as a matter of law that the lessee was not entitled to have the premises heated twenty-four hours of every day, where it also appeared that it was necessary for the proper operation of the plaintiff's railroad for it to use the premises on holidays, Sundays and at night. *Ibid.*

In the suit above described, it also was held that the defendant, having agreed, as mortgagee, at the making of the lease, to be bound by its terms in case he foreclosed his mortgage before its termination, could not, after such foreclosure, place upon the lease an interpretation different from what the original parties intended and adopted as their construction of its provisions. *Ibid.*

Where a lessee, voluntarily and deliberately with knowledge of the facts and without any misrepresentation or fraud on the part of the lessor, agreed to pay a fixed rent on two parcels of land and a rent equal to nine per cent of the valuation of two other parcels of back land as assessed by the proper authorities of a city, it was held that the lessee could not maintain a suit in equity to compel a separate assessment of the two parcels. *Hippodrome Amusement Co. v. Wit*, 216.

Common Passageway.

Where it was held that a verdict for the plaintiff was warranted in an action of tort against the owner of a certain tenement by the wife of a tenant for personal injuries, received when the plaintiff was passing through a cellar used as a common passageway. *Crudo v. Milton*, 229.

At the trial of the action described above, testimony of the agent in charge of the premises for the defendant, to the effect that after the accident he repaired the beams and flooring of the cellar, was held to have been admitted

properly as tending to show that the defendant had control of the cellar, that being a matter in dispute. *Crudo v. Milton*, 229.

Eviction.

Where at the trial of an action for damages resulting from eviction of the plaintiff there was evidence that the agent in charge of the premises for the owner had dealt with the plaintiff's lessor as lessee of the owner it was held insufficient to show that the original lessee had made an assignment from himself as an individual to himself as a trustee which had been assented to in writing by the owner. *Podren v. Macquarrie*, 127.

In the same action, where it appeared that the agent for the owner assured the plaintiff that his sublease was "all right," and that, relying on that assurance, the plaintiff thereafter paid rent and made repairs, it was held that the defendant was not thereby estopped to rely on the statute of frauds and to refuse to be bound by the oral assurance of the agent. *Ibid.*

The presence of cockroaches in an apartment leased for a dwelling, two years after the making of the lease, and an unsuccessful attempt of the lessor to destroy the cockroaches when notified by the lessee of their presence are not evidence of an eviction of the lessee from the apartment. *Hopkins v. Murphy*, 476.

At a second trial, after the sustaining of exceptions, of an action for rent alleged to be due under a lease in writing, where the defence alleged is an eviction of the defendant by the lessor and a surrender of the lease to the lessor by the defendant, evidence offered by the defendant to prove such eviction and surrender by the same facts that were in evidence at the former trial, on which the trial judge had found that there was no eviction and that the lessor had not accepted a surrender of the lease, is not to be excluded as *res judicata*, no final judgment having been entered. *Reidy v. Kennedy*, 514.

Evidence offered and excluded, at the trial of an action for rent alleged to be due under a lease in writing, tending to show a surrender of the lease and an eviction, which, it was held, should have been admitted. *Ibid.*

Upon the record in the same case it was held that the exclusion of certain evidence tending to show a surrender of the lease and eviction, was erroneous. *Ibid.*

Landlord's Liability for Injuries to Tenant and Members of Tenant's Family.

In an action of tort against the owner of a certain tenement by the wife of a tenant for personal injuries, received when the plaintiff was passing through a cellar used as a common passageway, to go to a water closet, it was held that there was evidence warranting a finding that, through negligence of the defendant, the flooring above the cellar had become unsafe and dangerous, and that a verdict for the plaintiff was warranted. *Crudo v. Milton*, 229.

At the trial of the action described above, testimony of the agent in charge of the premises for the defendant, to the effect that after the accident he repaired the beams and flooring of the cellar, was held to have been admitted properly as tending to show that the defendant had control of the cellar, that being a matter in dispute. *Ibid.*

Landlord and Tenant (continued).

In an action against a landlord by the administrator of the estate of the wife of a tenant for conscious suffering and death of the wife by reason of negligence in the repairs made on a piazza railing, it was held that, on the evidence, it could not be ruled as a matter of law that the plaintiff's intestate assumed the risk of her injury. *Bergeron v. Forest*, 392.

In an action by an administrator of the estate of the wife of a tenant at will, against the landlord for causing conscious suffering and death of the wife by reason of a fall due to the giving way of a railing of a piazza, it was alleged in two counts of the declaration that the landlord had undertaken to repair and had repaired negligently; and it was held that evidence at the trial entitled the plaintiff to go to the jury on the two counts because his intestate, the tenant's wife, belonged to the class contemplated by the parties as entitled to use the demised premises. *Ibid.*

Evidence at the trial of an action by the administrator of the estate of the wife of a tenant under a tenancy at will for causing conscious suffering and death of the wife caused by the giving way of a railing of a piazza, which the landlord had undertaken to repair and had repaired negligently, was held to warrant a finding that repairs upon the railing were made under the authority of the defendant. *Ibid.*

Where the owner of a tenement house orally lets to a tenant one floor without any agreement as a part of the contract of letting that he would assume the duty of looking after the condition of the premises, as to safety from time to time and of doing whatever is necessary to that end whenever occasion arises, he cannot be held liable for personal injuries suffered by the tenant or a member of his family by reason of a defective condition of the premises let unless he has undertaken to make the repairs and has made them negligently. *Ibid.*

Landlord's Liability in Tort to Persons invited upon Premises.

Where, at the trial of an action for personal injuries, caused by a defect in a passageway in a building, there is no evidence as to who caused the alleged defect, how long it had existed, whose tenant the plaintiff was nor the terms of his tenancy, a verdict should be ordered for the defendant. *Schena v. Bacigalupo*, 126.

If a landlord undertakes by a contract with the tenant at will to make certain repairs on the premises and makes the repairs negligently, he is liable for injuries resulting therefrom to all persons who within the contemplation of the parties were to use the premises under the tenancy. *Bergeron v. Forest*, 392.

If the landlord under the tenancy above described undertakes gratuitously to make certain repairs, and the death of the person, with whom he so undertakes, is caused by ordinary negligence on his part, he is liable, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing such death, but he is not liable for the death of any other person caused under such circumstances by either ordinary or gross negligence on his part. *Ibid.*

Repairs.

If the second floor of a house containing a separate tenement on each floor is let to a tenant, the railing of a platform and a corner post supporting the platform, so far as within the horizontal planes bounding the second floor,

are a part of the demised premises, which, unless otherwise provided by express agreement, the landlord is under no duty to keep in repair. *Conahan v. Fisher*, 234.

The mere fact that the supporting post, above described, constituted a part of the exterior construction and framework of the building essential for the other tenements as well as for the second floor tenement, does not bring it within the rule requiring the landlord to keep in repair portions of the building used in common by the occupants of the building and control of which is retained by the landlord. *Ibid.*

The mere facts, that a landlord at the request of the tenant made repairs upon the demised premises, from time to time, and that, about one month previous to an injury, the condition of the platform had been called to the attention of the landlord, who had employed a carpenter to look the platform over, does not constitute an admission of responsibility on the part of the landlord for the injury. *Ibid.*

In an action against the landlord by the wife of the tenant of the second floor for the injury received as above described, it was said that, if it was assumed that the defendant had agreed to make outside repairs upon the building, the ordinary implication was that he was to do so only upon reasonable notice and that there was no evidence of notice as to a defect in the railing the breaking of which caused the injury. *Ibid.*

In the same case it was held that a custom was not admissible in evidence to the effect that the owner should make necessary repairs and keep the property tenantable and in safe condition. *Ibid.*

Where the owner of a tenement house orally lets to a tenant one floor without any agreement as a part of the contract of letting that he would assume the duty of looking after the condition of the premises as to safety from time to time and of doing whatever is necessary to that end whenever occasion arises, he cannot be held liable for personal injuries suffered by the tenant or a member of his family by reason of a defective condition of the premises let unless he has undertaken to make the repairs and has made them negligently. *Bergeron v. Forest*, 392.

If a landlord undertakes by a contract with the tenant to make certain repairs on the premises and makes the repairs negligently, he is liable for injuries resulting therefrom to all persons who within the contemplation of the parties were to use the premises under the tenancy. *Ibid.*

If a landlord under a tenancy at will undertakes gratuitously to make certain repairs, he is not liable for personal injuries, not resulting in death, caused by ordinary negligence in making the repairs, but only if such injuries result through his gross negligence, and then only to the person with whom he makes the gratuitous undertaking. *Ibid.*

If the landlord under the tenancy above described undertakes gratuitously to make certain repairs, and the death of the person, with whom he so undertakes, is caused by ordinary negligence on his part, he is liable, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing such death, but he is not liable for the death of any other person caused under such circumstances by either ordinary or gross negligence on his part. *Ibid.*

Evidence testified to at the trial of the same action was held to warrant a finding that repairs upon the railing were made under the authority of the defendant. *Ibid.*

Landlord and Tenant (continued).

Evidence, at the same trial, was held to warrant a finding that the defendant undertook to make the repairs for a consideration, namely, to induce the tenant to continue his occupancy. *Bergeron v. Forest*, 392.

In the same action, it was alleged in two counts of the declaration that the landlord had undertaken to repair and had repaired negligently, and it was held that evidence at the trial entitled the plaintiff to go to the jury on the two counts because his intestate, the tenant's wife, belonged to the class contemplated by the parties as entitled to use the demised premises. *Ibid.*

Where at the trial of the action described above, evidence tending to show that throughout the district where the dwelling in question was situated, there was a custom that it was the duty of the landlord to make repairs upon the railings of piazzas which were a part of the premises let, was held to be inadmissible. Following *Conahan v. Fisher*, *ante*, 234. *Ibid.*

Evidence at the trial of the same action bearing on counts in the declaration which alleged that the repairs upon the railing of the piazza were made gratuitously by the landlord which was held to have warranted a finding of a gratuitous agreement by the defendant with the wife to make the repairs, negligence in the making of which caused her injury. *Ibid.*

It also was held in the same case that, on the evidence, it could not be ruled as a matter of law that the plaintiff's intestate assumed the risk of her injury. *Ibid.*

Discussion by Rugg, C. J., of liability of landlord in case of tenancy at will for personal injuries caused by want of repairs. *Fiormino v. Mason*, 451.

Upon the testimony given at the trial of an action by a tenant at will of a portion of a house of the defendant for personal injuries sustained in descending an outside flight of steps which were a part of the premises let to the plaintiff, it was held that the evidence warranted no further finding than that the defendant undertook to make necessary repairs on notice from the tenant, or possibly if a defect came under his own observation. *Ibid.*

Sublease.

Action against the owner of a building for damages resulting from an alleged unlawful eviction of the plaintiff could not be maintained because the plaintiff's claim to a right of possession was founded upon an alleged sublease which the sublessor executed "as trustee, but not individually," whereas the original lease was to him as an individual and he never had assigned it to himself as trustee. *Podren v. Macquarrie*, 127.

Surrender.

Evidence offered and excluded, at the trial of an action for rent alleged to be due under a lease in writing, tending to show a surrender of the lease and an eviction which, it was held, should have been admitted. *Reidy v. Kennedy*, 514.

In the same case it was held that certain evidence, which was not admissible to prove the surrender of the lease, was admissible for another purpose for which it was offered. *Ibid.*

Tenancy at Will.

Discussion by RUGG, C. J., of liability of landlord in case of tenancy at will for personal injuries caused by want of repairs. *Fiorntino v. Mason*, 451.

LAND REGISTRATION.

See LAND COURT.

LAW OF THE CASE.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

Liability of Corporation for Slander of Employee.

A corporation is liable for slanderous words uttered by one of its servants in the course of his employment. *Mills v. W. T. Grant Co.* 140.

LIMITATIONS, STATUTE OF.

In a suit in equity by a street railway corporation to establish a resulting trust in certain land, it was held that the defendant never denied the plaintiff's title before the bringing of the bill and the statute of limitations could not have begun to run in his favor. *Boston & Northern Street Railway v. Goodell*, 428.

The settlement before entry of an action for a debt barred by the statute of limitations is a good consideration for a note and mortgage, the debt having existed at the time of the settlement although the remedy for it was extinguished. *Clark v. Jones*, 591.

LOTTERY.

A "voting contest," conducted by a merchant, whereby purchasers would be entitled to prizes determined by votes, procured by purchasing goods of the defendant, was held not to be a "lottery" nor within the prohibitions of R. L. c. 214, § 7. *Whitman v. Fournier*, 154.

LOWELL.

The members of the municipal council of the city of Lowell, in removing an officer whom the charter of the city empowers them to remove under the laws regulating civil service, perform an executive or administrative act which in this particular must be performed in a judicial manner. *Stiles v. Municipal Council of Lowell*, 174.

St. 1911, c. 645, § 40, relating to the removal by the municipal council of Lowell of certain city officers, does not delegate judicial power to the council. *Ibid*.

Evidence in an action of tort for damages against a majority of the municipal council of Lowell, for removing from office the city treasurer and tax collector, upon which it was held that the members who constituted such majority acted without authority in law and without jurisdiction and were liable personally for damage caused to such officer by their wrongful acts. *Ibid*.

MANDAMUS.

Where the officials of a city, acting in good faith under authority of an ordinance of the city, have issued a permit to collect and dispose of the city's garbage to a corporation, a petition for a writ of mandamus cannot be maintained to compel them also to issue a similar permit to another. *Wheeler v. Boston*, 275.

Upon a petition for a writ of mandamus addressed to the Secretary of the Commonwealth commanding him to provide the petitioners with blanks for the use of subsequent signers of a petition filed under art. 48 of the Amendments to the Constitution asking for a referendum on a joint resolution of the General Court, it was held that the court had no power to pass upon an abstract question and that the petition must be dismissed. *Sullivan v. Secretary of the Commonwealth*, 543.

MARRIAGE AND DIVORCE.

So far as relates to enforcement in the courts of this State, a decree of a court of a sister State for separate maintenance or for alimony ordered in divorce proceedings is like any other money judgment in an action at law for a debt or a decree of a court of equity for the payment of money, and it is immaterial whether the original decree was based on an action of contract or on a petition for separate maintenance in divorce or probate proceedings. *White v. White*, 39.

A decree for the plaintiff in a suit in equity in our Superior Court to enforce a decree of a New Jersey court of chancery ordering a husband to pay a certain sum of money to his wife, the plaintiff, for her separate maintenance, may be enforced by proceedings in contempt, although the decree of the Superior Court merely directs that a certain sum of money be paid to the plaintiff by the defendant and that execution issue therefor. *Ibid*.

An alleged will in favor of the person who after its execution became the wife and widow of the alleged testator, and who was induced to marry him by his oral promise to make a will in her favor, is revoked under R. L. c. 135, § 9, by such subsequent marriage, if it does not appear from the alleged

will that it was made in contemplation of such marriage. *Sughrue v. Barlow*, 468.

Where, at a hearing before a master, in a probate appeal where the validity of a marriage in the State of Rhode Island was in issue, certain sections of a statute of Rhode Island were put in evidence which never had been construed by the courts of that State, and the opinion of a member of the bar of Rhode Island, who testified as an expert as to the correct construction of the statute, was the only evidence on the subject except the statute itself, it was held that the master had the right to disregard the testimony of the expert and to form his own opinion as to the legal effect of the statute. *Martin v. Otis*, 491.

In an appeal from a decree of the Probate Court appointing an administrator, it was held upon certain findings of the master that the surviving husband, although his marriage to the intestate was lawful, was not a suitable person to administer the estate of his wife and that on this ground a decree of the Probate Court appointing him administrator of her estate should be reversed. *Ibid.*

The consummation of a marriage by coition is not necessary to its validity. *Ibid.*

The conclusion of a master appointed by the Probate Court, that a marriage in Rhode Island was irregular according to one section of a statute of Rhode Island, but under another section of the same statute, if otherwise valid, was valid in spite of such irregularity, was held to have been correct. *Ibid.*

Where a divorce *nisi* was granted during the great war to one born in Germany, it is not open to the libellee to contend that the decree of divorce is invalid by reason of the fact that the libellant was naturalized unlawfully, because the decree admitting the libellant to citizenship is conclusive as to all matters necessarily before the court that made it and involved in the issue, and can be impeached or annulled only by a direct proceeding brought for that purpose. *Oehlert v. Oehlert*, 497.

In a libel for divorce brought by a husband, it was held that a previous decree of the Probate Court on the wife's petition for separate support, affirmed on appeal, to the effect that the husband had deserted his wife and that she was living apart from him for justifiable cause, was a bar to the maintenance of the libel. *Austin v. Austin*, 528.

MASSACHUSETTS GENERAL HOSPITAL.

St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, denying exemption from taxations to certain charitable corporations, does not deny to the Massachusetts General Hospital, owning property in the town of Belmont which is called the McLean Hospital and which is taxable under the provisions of the statute, the equal protection of the laws guaranteed both by the State and the Federal Constitution. *Massachusetts General Hospital v. Belmont*, 190.

The mere fact that only two institutions in the Commonwealth are included within the classification described in the statute above referred to, although it is a factor not to be lightly disregarded, is not conclusive against the validity of the statute, where it appears that the classification is rational. *Ibid.*

Massachusetts General Hospital (continued).

The enforcement of St. 1909, c. 490, Part I, § 5, cl. 3, as amended, by the collection by the town of Belmont of a tax upon property of the Massachusetts General Hospital in Belmont known as the McLean Hospital, does not deprive the corporation of its property without due process of law. *Massachusetts General Hospital v. Belmont*, 190.

At a hearing of a petition under St. 1909, c. 490, Part I, § 77, appealing from a refusal of the assessors of the town of Belmont to abate a tax assessed under the provisions of the amendment contained in St. 1914, c. 518, § 1, where the petitioner requested many rulings which correctly stated various principles to be observed in ascertaining the fair cash value of the property for the purposes of taxation, and the judge granted the requests with the qualification that the meaning of the phrase "fair cash value" could not be expressed in a single sentence, it was held that no error was shown. *Ibid.*

Where at the same hearing the judge refused a ruling that "The 'fair cash value' of the real estate in question consists of the value of the property in the market apart from its special adaptability for hospital purposes, plus such sum as a purchaser might add to that value because of the chance that the property might at some time be sought for use as a hospital," it was held, that the refusal of the ruling could not be pronounced erroneous. *Ibid.*

For the reason above stated in the same case, it likewise was held not to have been erroneous for the judge to have refused to rule, "The 'fair cash value' of the real estate in question is no greater than it would be if such real estate were owned by a person to whom the buildings and improvements were of no use." *Ibid.*

In the same case it also was held not to have been erroneous for the judge to refuse to rule "The 'fair cash value' of the real estate in question is the value which the petitioner could have obtained for it at the date as of which the assessment is made, if it had then desired to sell said real estate, after fair and reasonable efforts had been made to find a purchaser who would give the highest price for it." *Ibid.*

Where the judge also, at the hearing above described, being asked to give as a ruling, "The 'fair cash value' of the real estate in question is the value which it would have had on April 1 [of the year in question] in the hands of any owner," gave the ruling with a modification which added the words, "including the present owner," it was held that the modification of the ruling was not erroneous. *Ibid.*

Where at the hearing above described the petitioner excepted to the refusal of the judge to make certain rulings asked for fixing the correct rule for computing the "fair cash value" of the estate for the purposes of taxation it was held, that the exception must be sustained and the case remanded to the Superior Court for further hearing, on the issue as to the fair cash value of the property in question. *Ibid.*

Where the return to the assessors of Belmont made by the Massachusetts General Hospital, having a usual place of business in Boston, but owning property in Belmont, was sworn to before a notary public and not before one of the assessors of Belmont, it was held, that the return was properly sworn to under St. 1909, c. 490, Part I, § 43, as it could not be said that the petitioner was not a person absent from Belmont. *Ibid.*

MECHANIC'S LIEN.

Where it appeared at the hearing of a petition for the establishment of a mechanic's lien under R. L. c. 197, that two who were owners in common agreed in writing to sell real estate and, previous to the making of the agreement the prospective purchaser made a contract for repairing the premises and was permitted by the owners to take possession of the premises so that the mechanics might do their work, it was held that the foregoing facts alone did not warrant a finding that the agreement of the prospective purchaser with the petitioner was made by consent of the owners or of a person rightfully acting for them in procuring or furnishing such labor or materials. *Roxbury Painting & Decorating Co. v. Nute*, 112.

Where, at the trial of a petition for the establishment of a mechanic's lien under R. L. c. 197, against two who owned the real estate as tenants in common, it appeared that a contract for labor and materials was made with the petitioner by one who did so with the consent of one of the tenants in common, it was held that the lien might be established as to the interest of the tenant in common who consented to the making of the contract with the petitioner, and must be dismissed as to the other tenant in common. *Ibid.*

In an action by a subcontractor against a landowner on the latter's agreement to pay the subcontractor's bill, if the subcontractor would not try to enforce a mechanic's lien, it was held that under R. L. c. 197, § 2, a lien for labor only could have been enforced against the defendant's property. *Manson v. Flanagan*, 150.

An instrument in writing signed by a building contractor and the owner of certain real estate which, it was held, did not fulfil the requirement of Sts. 1915, c. 292; 1916, c. 306, as to a mechanic's lien. *Varnum v. Kogios*, 264.

Under St. 1915, c. 292, § 2, amended by St. 1916, c. 306, § 1, where it is sought, either by a principal contractor or by a subcontractor, to maintain a mechanic's lien for labor and material performed or furnished under or by virtue of a written contract, there must be filed in the registry of deeds for the county or district where the land is located, by some person entitled to maintain the lien, a notice in writing stating among other matters the date when the contract is to be completed. *Pratt & Forrest Co. v. Strand Realty Co. of Lowell*, 314.

A landowner by accepting material after the original contractor had become incapable of completing the contract and long after the date fixed by the contract for completing the work, is not estopped to object to the sufficiency of the original notice recorded long before that time by the contractor in an attempted compliance with the requirement of St. 1915, c. 292, and St. 1916, c. 306, as to mechanics' lien proceedings. *Ibid.*

Bill in equity to enforce an alleged mechanic's lien, which, it was held, must be dismissed because a notice of the contract, filed by the contractor in the registry of deeds as required by St. 1915, c. 292; St. 1916, c. 306, did not properly state the time when the contract was to be completed. *Ibid.*

MEDFORD.

Under St. 1917, c. 344, Part III, § 1, a betterment tax for a benefit received from the laying out of a public street in a city must be assessed within two years after the passage of the order of layout, and in the city of Medford this period of limitation runs from the time when the order of layout was approved by the mayor. *Jewett v. Mayor of Medford*, 65.

Acting under the revised charter of the city of Medford contained in St. 1903, c. 345, as amended by Spec. St. 1915, c. 160, the board of aldermen of Medford passed an order assessing betterments for the laying out of a street in that city, which was not approved by the mayor, and it was held that the order of assessment, being subject to the mayor's veto but not having his approval within the required time, was invalid because it was not passed within two years after the order of layout. *Ibid*.

MEMORANDA.

Resignation of Justice Loring, 521.

Appointment of Justice Jenney, 527.

MINOR.

See INFANT.

MORTGAGE.

Of Real Estate.

Consideration.

The settlement before entry of an action for a debt barred by the statute of limitations is a good consideration for a note and mortgage, the debt having existed at the time of the settlement although the remedy for it was extinguished. *Clark v. Jones*, 591.

Discharge.

Where the owner of a note secured by a mortgage of the maker's real estate made statements to the mortgagor which plainly showed that he considered that the mortgagor had paid enough on the debt, that he considered the mortgage paid and that he intended to make a transfer of the title in the future by discharging it, but died without having done so, such facts are not sufficient to show a complete declaration of a trust of the note for the benefit of the mortgagor. *Cardozo v. Leveroni*, 310.

Foreclosure.

Where, upon the reservation for determination by this court of a suit in equity for specific performance of an agreement to buy real estate which the plaintiff as mortgagee had purchased at the foreclosure sale, it appeared that the plaintiff alleged that no person in the military service of the United States had any interest in the premises and no evidence on that issue was presented, it was held that the suit must stand for a hearing of the question of fact, whether any person in the military service of the

United States had any interest in the premises in question. *Morse v. Stober*, 223.

While the only way in which a mortgagee can be certain that the foreclosure of his mortgage will not be in violation of the Soldiers' and Sailors' Civil Relief Act, is to foreclose the mortgage under an order of a court of equity, nevertheless it is not impossible for a mortgagee, after purchasing the real estate at a foreclosure sale without such an order of a court, to prove beyond a reasonable doubt that no person in the military service of the United States had any interest, legal or equitable, in the premises in question, so that he might maintain a suit in equity for specific performance against one who had agreed to purchase the property from him. *Ibid*.

In a suit against a mortgagee of demised premises subject to a lease, who had agreed to be bound by the provisions of the lease if he foreclosed his mortgage, and who had so foreclosed, it was held that evidence of the conduct of the original lessor and the defendant was admissible to show the construction put upon an ambiguous provision of the lease as to hearing by the parties themselves. *New York Central Railroad v. Stoneman*, 258.

In the suit above described, it also was held that the defendant, having agreed, as mortgagee, at the making of the lease, to be bound by its terms in case he foreclosed his mortgage before its termination, could not, after such foreclosure, place upon the lease an interpretation different from what the original parties intended and adopted as their construction of its provisions. *Ibid*.

A gratuitous promise to discharge a debt evidenced by a note secured by a mortgage of real estate, not accompanied by the redelivery of the note or mortgage or by the execution or delivery of any instrument to carry out the promise, does not extinguish the debt nor, after the death of the mortgagee, give to the mortgagor a right to maintain a suit in equity to enjoin the foreclosure of the mortgage by the administrator of his estate. *Cardona v. Laveroni*, 310.

MOTOR VEHICLE.

Registration.

A corporation, which was incorporated under the laws of the State of Maine and which for more than thirty days has had several places of business in this Commonwealth, does not come within the definition of "non-resident," given in St. 1914, c. 204, § 1, under the provisions of the statute relating to registration of motor vehicles. *Gondek v. Cudahy Packing Co.* 105.

A motor vehicle of a foreign corporation, having a place of business in this Commonwealth, while being operated upon a public way in this Commonwealth without having been registered here, is an outlaw. *Ibid*.

Evidence as to the control over a motor vehicle owned by a foreign corporation and negligently operated by an employee of the owner within this Commonwealth, upon which it was held, in an action against the corporation for injuries, that findings were not warranted either that the motor vehicle was being operated on business of the corporation or that its general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business. *Ibid*.

Motor Vehicle (*continued*).

Operated in Interstate Commerce.

An ordinance of a city entitled "Hackney Carriages, Trucks, Drays, etc.," passed under R. L. c. 25, § 24, before the enactment of St. 1916, c. 293, was held not to apply nor to be intended to apply to the use or driving of a motor vehicle devoted exclusively to the transportation of passengers for hire between a city in another State and a city in this Commonwealth. *Commonwealth v. O'Neil*, 535.

See also NEGLIGENCE, *Motor Vehicle*.

MOVING PICTURES.

See THEATRE.

MUNICIPAL CORPORATIONS.

By-Laws and Ordinances.

An ordinance of the city of Boston and a regulation by the board of health, which prohibited the transporting of garbage through the public ways of the city except by the city or its contractors and their agents, were held to be justifiable as reasonable exercises of the police power. *Wheeler v. Boston*, 275.

An ordinance of a city entitled "Hackney Carriages, Trucks, Drays, etc.," passed under R. L. c. 25, § 24, before the enactment of St. 1916, c. 293, was held not to apply nor to be intended to apply to the use or driving of a motor vehicle devoted exclusively to the transportation of passengers for hire between a city in another State and a city in this Commonwealth, and a person engaged solely in such interstate commerce cannot be prosecuted under the ordinance for driving without a license. *Commonwealth v. O'Neil*, 535.

Officers and Agents.

Conditions of the contract of employment of a claimant under the workmen's compensation act against a town, upon which it was held that the claimant was an independent contractor and not an employee of the town and could not be awarded compensation. *Eckert's Case*, 577.

Mayor.

Under St. 1917, c. 344, Part III, § 1, a betterment tax for a benefit received from the laying out of a public street in a city must be assessed within two years after the passage of the order of layout, and in the city of Medford this period of limitation runs from the time when the order of layout was approved by the mayor. *Jewett v. Mayor of Medford*, 65.

Acting under the revised charter of the city of Medford contained in St. 1903, c. 345, as amended by Spec. St. 1915, c. 160, the board of aldermen of Medford passed an order assessing betterments for the laying out of a street in that city, which was not approved by the mayor, and it was held that the order of assessment, being subject to the mayor's veto but not having his approval within the required time, was invalid because it was not passed within two years after the order of layout. *Ibid*.

Removal of Officers.

The members of the municipal council of the city of Lowell, in removing an officer whom the charter of the city empowers them to remove under the laws regulating the civil service, perform an executive or administrative act which in this particular must be performed in a judicial manner. *Stiles v. Municipal Council of Lowell*, 174.

The cloak of office does not protect executive or administrative officers who interfere with rights of individuals in ways not authorized by law, but they are liable personally for such wrongful interference. *Ibid.*

St. 1911, c. 645, § 40, relating to the removal by the municipal council of Lowell of certain city officers, does not delegate judicial power to the council. *Ibid.*

Evidence in an action of tort for damages against a majority of the municipal council of Lowell, for removing from office the city treasurer and tax collector, upon which it was held, that the members who constituted such majority acted without authority in law and without jurisdiction and were liable personally for damage caused to such officer by their wrongful acts. *Ibid.*

In the same case it was held that the amounts reasonably paid by the plaintiff for counsel fees in procuring reinstatement to office constituted an element of his damages. *Ibid.*

In the same case it was held that the plaintiff was entitled to have the jury consider as an element of his damages the loss he sustained by reason of his being compelled to resign because he was unable to secure a bond owing to the incidents attendant upon the litigation, and being unable to obtain more lucrative employment elsewhere. *Ibid.*

At the trial, of the same action, testimony of agents of various bonding companies, tending to show that the refusal of the companies to furnish a bond to the plaintiff was due to the incidents connected with the litigation attendant upon the plaintiff's removal and reinstatement, was competent. *Ibid.*

At the trial of the action above described, the plaintiff was entitled to have the jury consider as an element of his damage such mental suffering on his part as was a natural and proximate result of the wrongful acts of the defendants. *Ibid.*

Where at the trial above described it appeared that the defendants had contended that they were justified in removing the plaintiff from office because he had left large sums of the city's money on deposit with a certain bank in preference to other banks and had failed to collect sums due to the city from that bank as interest on daily balances, it was held that testimony of the plaintiff was admissible tending to refute the defendants' contention that the plaintiff's mental suffering was caused, not by their wrongful action in removing him, but by the controversy as to the relation between the plaintiff and the bank in question. *Ibid.*

Liability of Officers for Unauthorized Act.

The cloak of office does not protect executive or administrative officers who interfere with rights of individuals in ways not authorized by law, but they are liable personally for such wrongful interference. *Stiles v. Municipal Council of Lowell*, 174.

Municipal Corporations (continued).

Where, in an action of tort for damages against a majority of the municipal council of Lowell, for removing from office the city treasurer and tax collector, it appeared that they failed to notify him of their proposed action and to furnish him with a copy of the reasons therefor, it was held that the members who constituted such majority acted without authority in law and without jurisdiction and were liable personally for damage caused to such officer by their wrongful acts. *Stiles v. Municipal Council of Lowell*, 174.

In the same case it was held that the amounts reasonably paid by the plaintiff for counsel fees in procuring reinstatement to office constituted an element of his damages. *Ibid.*

In the same case it was held that the plaintiff was entitled to have the jury consider as an element of his damages the loss he sustained by reason of his being compelled to resign and being unable to obtain more lucrative employment elsewhere, because he was unable to secure a bond owing to the incidents attendant upon the litigation. *Ibid.*

Distribution of Income Tax.

In St. 1917, c. 209, § 1, the words, "total local tax levy," mean the levy for all purposes, and not the levy for municipal purposes only. *Cambridge School Committee v. Mayor & City Council of Cambridge*, 6.

Garbage.

It is within the limits of the police power for a municipality to confine to a single person or corporation the collection, transportation through its streets and final disposition of garbage, which is an actual and potential source of disease and a detriment to the public health and may easily become a public nuisance. *Wheeler v. Boston*, 275.

Where the officials of a city, acting in good faith under authority of an ordinance of the city, have issued a permit to collect and dispose of the city's garbage to a corporation, a petition for a writ of mandamus cannot be maintained to compel them also to issue a similar permit to another. *Ibid.*

NATURALIZATION.

Where a divorce *nisi* was granted during the great war to one born in Germany, it is not open to the libellee to contend that the decree of divorce is invalid by reason of the fact that the libellant was naturalized unlawfully, the decree admitting the libellant to citizenship being conclusive as to all matters necessarily before the court that made it and involved in the issue, and can be impeached or annulled only by a direct proceeding brought for that purpose. *Oehlert v. Oehlert*, 497.

NEGLIGENCE.

Plaintiff's Due Care: Contributory Negligence.

Of member of the crew of a fishing schooner. *Cambra v. Santos*, 131.

Of a passerby helping employees of a contractor to unload poles of the defendant from a railroad car. *Sandon v. Kendall*, 292.

Evidence in an action against a street railway company for injuries alleged to have been caused by the collision of an express car operated negligently by the servants of the defendant with a motor car driven by the plaintiff, upon which it was held that it was right for the presiding judge to refuse to make a ruling that the plaintiff was in the exercise of due care and that the defendant was negligent. *Morrissey v. Connecticut Valley Street Railway*, 554.

St. 1914, c. 553, relating to contributory negligence, affects procedure only, and therefore is applicable in an action brought in this Commonwealth for personal injuries suffered in another State. *Levy v. Steiger*, 600.

Passerby Assisting.

In an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who, while complying with a request by an employee of the contractor to "give us a hand" was killed, it was held that the questions, whether the decedent was in the exercise of due care or had assumed the risk of the injury, were for the jury. *Sandon v. Kendall*, 292.

In the same case it was held that it could not be held as a matter of law that the decedent was a mere volunteer or a licensee to whom the owner, or his employee, owed no duty of carefulness; and, if it were found that he had become a fellow servant of the employees of the contractor, he was owed the same duty as was owed to them by the owner and his employee. *Ibid.*

Toward Employee of Independent Contractor.

At the trial of an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who was asked by an employee of the contractor to "give us a hand" for the purpose of moving the car, and, as he was complying with the request, was killed by the falling of a gin pole that was part of the contractor's rigging, it was held that a verdict for the plaintiff was warranted. *Sandon v. Kendall*, 292.

Assumption of Risk.

Action of tort against the master and owners of a fishing schooner by a member of the crew for personal injuries, where it was held that the questions of the due care of the plaintiff and of his assumption of risk were for the jury with the burden of proof on the defendants. *Cambra v. Santos*, 131.

Evidence at the trial of an action to recover for causing the death of a passerby, who was asked by an employee of a contractor to "give us a hand" for the purpose of moving a car, and, as he was complying with the request, was killed by the falling of a gin pole, was held to require that the questions, whether the decedent was in the exercise of due care or had assumed the risk of the injury, be submitted to the jury. *Sandon v. Kendall*, 292.

In an action against a landlord by the administrator of the estate of the wife of a tenant, for causing conscious suffering and death of the wife by reason of negligence in the repairs made on a piazza railing, it was held that on the evidence it could not be ruled as a matter of law that the plaintiff's intestate assumed the risk of her injury. *Bergeron v. Forest*, 392.

*Employer's Liability.**Effect of workmen's compensation act.*

In an action at common law for personal injuries sustained while in the employ of the defendant, where it appeared that the plaintiff entered the defendant's employ before July 1, 1912, when the defendant became a subscriber under the workmen's compensation act and posted printed notices in form and substance as required by St. 1911, c. 751, Part IV, §§ 20, 21, it was held that the plaintiff by failing to give the notice required by Part I, § 5, had waived her right of action at common law, although she had had no knowledge of the fact that the defendant was a subscriber. *Gilbert v. Wire Goods Co.* 570.

Dangerous and defective machinery and appliances.

Where in an action at common law by an administrator against the employer of the plaintiff's intestate for personal injuries of the plaintiff's intestate sustained, while at work on a pile driver, before the provisions of the workmen's compensation act took effect, and there was no evidence that the construction or arrangement of the machinery was such that the employer had any reason to apprehend such an occurrence as resulted in the intestate's injuries, it was held that there was no evidence of negligence on the part of the defendant employer. *McAller v. Gillett*, 95.

An action of tort against the master and owners of a fishing schooner by a member of the crew for personal injuries, where it was held that the responsibility for the defective and dangerous condition of the permanent and essential appliances to which the employees were exposed in performing their required work could not be delegated by their employer or employers. *Cambra v. Santos*, 131.

In an action of tort at common law against the master and owners of a fishing schooner by a member of the crew for personal injuries sustained from an explosion of gasoline, when it was being put into the gasoline tank of the schooner in Boston Harbor, it was held, that there was evidence that the plaintiff was set at work without warning in a place which could have been found to have been particularly dangerous under the circumstances. *Ibid.*

Fellow servant.

An action of tort against the master and owners of a fishing schooner by a member of the crew for personal injuries, where it was held that it could not have been ruled that the master of the schooner, whether he was the owner of the schooner *pro hac vice* or was acting as the agent of all the owners, was a fellow servant of the plaintiff. *Cambra v. Santos*, 131.

At the trial of an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who was asked by an employee of the contractor to "give us a hand" for the purpose of moving the car, and, as he was complying with the request, was killed by the falling of a gin pole that was part of the contractor's rigging, it was held that the evidence warranted findings that the decedent, in assisting the employee of the contractor at his request, became his fellow servant. *Sandon v. Kendall*, 292.

In the same case it also was held that it could not be ruled as a matter of law

that the contractor's employees, in obeying directions of the owner's employee as to moving the car, became his fellow servant. *Sandon v. Kendall*, 292.

In the same case it was held that it could not be ruled as a matter of law that the decedent was a mere volunteer or a licensee to whom the owner, or his employee, owed no duty of carefulness; and, if it were found that he had become a fellow servant of the employees of the contractor, he was owed the same duty as was owed to them by the owner and his employee. *Ibid*.

Street Railway.

Person on highway.

At the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, who was run into on a well lighted street and not at a stopping place or a crosswalk, where the evidence in its aspect most favorable to the plaintiff tended to show that the defendant was in the exercise of due care and the plaintiff was negligent, it was held that there was no evidence warranting a verdict for the plaintiff. *Driscoll v. Boston Elevated Railway*, 232.

Where, at the trial of an action of tort against a street railway company for damages to the plaintiff's property alleged to have resulted from a collision of a team of the plaintiff with a street car of the defendant, the evidence on the question of liability is conflicting, a ruling, that on all the evidence the plaintiff was entitled to recover, must be denied. *McNeil v. Middlesex & Boston Street Railway*, 254.

At such a trial the judge need not give a ruling that "there is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way . . . must look and listen for an approaching car before entering upon the tracks of the electric railway," even if it is a correct statement of the law. *Ibid*.

Testimony at the trial of an action against a street railway company for personal injuries received when the plaintiff was run into at night by a car of the defendant, which was held to be evidence of negligence of the conductor which contributed to cause the injury. *Pierce v. Worcester Consolidated Street Railway*, 301.

Evidence in an action against a street railway company for injuries alleged to have been caused by the collision of an express car operated negligently by the servants of the defendant with a motor car driven by the plaintiff, upon which it was held that it was right for the presiding judge to refuse to make a ruling that the plaintiff was in the exercise of due care and that the defendant was negligent. *Morrissey v. Connecticut Valley Street Railway*, 554.

In the same action it was held that the admission of testimony of the motor-man as to the distance at which his car could have been heard on the night of the collision could not be held to be harmfully erroneous. *Ibid*.

Passenger.

The mere fact that by reason of the crowded condition of a street railway car a passenger is caused to fall through a door of the car when it is opened at a stopping place and is injured, is not evidence of negligence rendering the

Negligence (continued).

company operating the car liable to the passenger. *Knowles v. Boston Elevated Railway*, 347.

Upon evidence, which tends merely to show that, at a certain station the cars of a street railway company were always filled with passengers at a certain hour of the day and that on a certain morning a car was so crowded that the guard "had to press the doors in," and that, when the car reached a stop about twelve minutes from its starting place and the doors were opened, the pushing of the crowd thrust a passenger out of the door and caused him to fall into the street, St. 1906, c. 463, Part III, § 96, was held not to be applicable in an action against the street railway company for personal injuries received by such passenger. *Ibid.*

Motor Vehicle.

The consequence of one permitting a nuisance, such as an unregistered motor vehicle operated upon a highway, is that he is responsible for injuries caused thereby even although such vehicle is at the moment when such injuries are caused being used in the business or pleasure of another. Per RUGG, C. J. *Gondek v. Cudahy Packing Co.* 105.

Evidence as to the control over a motor vehicle owned by a foreign corporation and negligently operated within this Commonwealth upon which it was held, in an action against the corporation for injuries, that findings were not warranted either that the motor vehicle was being operated on business of the corporation or that its general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business. *Ibid.*

In an action for personal injuries from being run into by a motor truck where the judge refused a request to rule that, if the driver of the truck was driving for the sole purpose of going to his own home, he was acting outside the scope of his employment, upon the evidence it was held that the instruction requested should have been given. *McGrath v. Wehrle*, 456.

Of One controlling Real Estate.

Discussion by RUGG, C. J., of liability of landlord in case of tenancy at will for personal injuries caused by want of repairs. *Fiorntino v. Mason*, 451.

Where, at the trial of an action for personal injuries, caused by a defect in a passageway in a building, there is no evidence as to who caused the alleged defect, how long it had existed, whose tenant the plaintiff was nor the terms of his tenancy, a verdict should be ordered for the defendant. *Schena v. Bacigalupo*, 126.

In an action against the person in control of real estate for personal injuries sustained from falling on ice on a public sidewalk alleged to have been formed by water coming from a conductor on the premises of the defendant, it was held that the plaintiff was entitled to go to the jury, the fact, that the water that was poured from the spout fell, not upon the sidewalk, but upon the sloping bank some feet back from the street, not being conclusive against the plaintiff. *Cochran v. Barton*, 147.

Evidence in an action of tort against the owner of a certain tenement was held to warrant a finding that, through negligence of the defendant, the flooring above a cellar had become unsafe and dangerous to persons using

a common passageway, so that a verdict for the plaintiff was warranted. *Crudo v. Milton*, 229.

At the trial of the action described above, testimony of the agent in charge of the premises for the defendant, to the effect that after the accident he repaired the beams and flooring of the cellar, was held to have been admitted properly as tending to show that the defendant had control of the cellar, that being a matter in dispute. *Ibid.*

Evidence testified to at the trial of an action by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife due to the giving way of a railing of a piazza, was held to warrant a finding that repairs upon the railing were made under the authority of the defendant. *Bergeron v. Forest*, 392.

Where at the trial of the same action the defendant asked the judge to rule that the plaintiff could not recover unless there was an agreement between the defendant and the deceased wife "to make repairs, negligent making of them and an injury to her in consequence of such gross negligence," it was held that the request for a ruling, although not strictly accurate, was sufficient to direct the judge's attention to an important principle of law, which in his charge he had misstated, and that harmful error thus was committed. *Ibid.*

If a landlord under a tenancy at will undertakes gratuitously to make certain repairs, he is not liable for personal injuries, not resulting in death, caused by ordinary negligence in making the repairs, but only if such injuries result through his gross negligence, and then only to the person with whom he makes the gratuitous undertaking. *Ibid.*

If a landlord undertakes by a contract with the tenant to make certain repairs on the premises and makes the repairs negligently, he is liable for injuries resulting therefrom to all persons who within the contemplation of the parties were to use the premises under the tenancy. *Ibid.*

Where the owner of a tenement house orally lets to a tenant one floor without any agreement as a part of the contract of letting that he would assume the duty of looking after the condition of the premises, as to safety from time to time and of doing whatever is necessary to that end whenever occasion arises, he cannot be held liable for personal injuries suffered by the tenant or a member of his family by reason of a defective condition of the premises let unless he has undertaken to make the repairs and has made them negligently. *Ibid.*

In Use of Highway.

Evidence as to the control over a motor vehicle owned by a foreign corporation and negligently operated within this Commonwealth, upon which it was held in an action against the corporation for injuries, that findings were not warranted either that the motor vehicle was being operated on business of the corporation or that its general manager had authority to cause the defendant's motor vehicle to be operated unlawfully upon a public way in this Commonwealth on his personal business. *Gondek v. Cudahy Packing Co.* 105.

The consequence of one permitting a nuisance, such as an unregistered motor vehicle operated upon a highway, is that he is responsible for injuries caused thereby even although such vehicle is at the moment when such injuries

Negligence (*continued*).

are caused being used in the business or pleasure of another. Per RUGG, C. J. *Gondek v. Cudahy Packing Co.* 105.

At the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, who was run into on a well lighted street and not at a stopping place or a crosswalk, where the evidence in its aspect most favorable to the plaintiff tended to show that the defendant was in the exercise of due care and the plaintiff was negligent, it was held that there was no evidence warranting a verdict for the plaintiff. *Driscoll v. Boston Elevated Railway*, 232.

Where, at the trial of an action of tort against a street railway company for damages to the plaintiff's property alleged to have resulted from a collision of a team of the plaintiff with a street car of the defendant, the evidence on the question of liability is conflicting, a ruling, that on all the evidence the plaintiff was entitled to recover, must be denied. *McNeil v. Middlesex & Boston Street Railway*, 254.

At such a trial the judge need not give a ruling, that "there is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way . . . must look and listen for an approaching car before entering upon the tracks of the electric railway," even if it is a correct statement of the law. *Ibid*.

Testimony at the trial of an action against a street railway company for personal injuries received when the plaintiff was run into at night by a car of the defendant, which was held to be evidence of negligence of the conductor which contributed to cause the injury. *Pierce v. Worcester Consolidated Street Railway*, 301.

Of Bailees.

A bailee of chattels, who delivers the chattels to a person not authorized by the owner to receive them, is liable to the owner for a conversion of the goods, whether he was negligent or not. *Blaisdell v. Herrum & Co. Inc.* 91.

Object thrown from Building.

Evidence of a certain statement of an employee of the defendant given at the trial of an action for personal injuries caused by the plaintiff being struck by an iron washer thrown from a window of the defendant's building was held incompetent as against the defendant as not being within the scope of the authority of the employee who made it, but having been admitted without objection, it was held that it should be given its probative force. *Douglas v. Holyoke Machine Co.* 573.

In the case above described it was held that a verdict ought to have been ordered for the defendant, because the most that could be found in favor of the plaintiff was that the washer that injured the plaintiff came out of a window of the defendant's building by the act of one of its employees, without any indication that this was done in furtherance of the defendant's business. *Ibid*.

Of Physician and Surgeon.

Where, at the trial of an action against a physician and surgeon for personal injuries alleged to have resulted from negligence of the defendant in treat-

ing the plaintiff, there was conflicting testimony as to whether an operation, if performed upon the plaintiff during a certain period, probably would have restored the use of the arm or some of it, it was held that a verdict for the plaintiff was warranted. *Tucker v. Stetson*, 81.

Snow and Ice.

In an action against the person in control of real estate for personal injuries sustained from falling on ice on a public sidewalk alleged to have been formed by water coming from a conductor on the premises of the defendant, it was held that the plaintiff was entitled to go to the jury, the fact, that the water that was poured from the spout fell, not upon the sidewalk, but upon the sloping bank some feet back from the street, not being conclusive against the plaintiff. *Cochran v. Barton*, 147.

In Use of Gin Pole.

At the trial of an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who was asked by an employee of the contractor to "give us a hand" for the purpose of moving the car, and, as he was complying with the request, was killed by the falling of a gin pole that was part of the contractor's rigging, it was held that a verdict for the plaintiff was warranted. *Sandon v. Kendall*, 292.

In operating Pile Driver.

Where in an action at common law by an administrator against the employer of the plaintiff's intestate for personal injuries of the plaintiff's intestate sustained while at work on a pile driver, before the provisions of the workmen's compensation act took effect, there was no evidence that the construction or arrangement of the machinery was such that the employer had any reason to apprehend such an occurrence as resulted in the intestate's injuries, it was held that there was no evidence of negligence on the part of the defendant employer. *McAller v. Gillett*, 95.

Gross.

Where, in an action by the administrator of the estate of the wife of a tenant at will against the landlord for causing conscious suffering and death of the wife, there was no allegation in the declaration that the injury was due to gross negligence of the defendant, and no question of pleading was raised, and the defendant asked the judge to rule that the plaintiff could not recover unless the injury was in consequence of gross negligence, it was held that the request for a ruling, although not strictly accurate, was sufficient to direct the judge's attention to an important principle of law, which in his charge he misstated, and that harmful error thus was committed. *Bergeron v. Forest*, 392.

If a landlord under a tenancy at will undertakes gratuitously to make certain repairs, he is not liable for personal injuries, not resulting in death, caused

Negligence (*continued*).

by ordinary negligence in making the repairs, but only if such injuries result through his gross negligence, and then only to the person with whom he makes the gratuitous undertaking. *Bergeron v. Forest*, 392.

Causing Death.

At the trial of an action by an administrator against a street railway company for causing the death of the plaintiff's intestate, who was run into on a well lighted street, and not at a stopping place or a crosswalk, where the evidence in its aspect most favorable to the plaintiff tended to show that the defendant was in the exercise of due care and the plaintiff was negligent it was held that there was no evidence warranting a verdict for the plaintiff. *Driscoll v. Boston Elevated Railway*, 232.

In an action against the owner of certain poles, delivered to him in a railroad car in a railroad yard, to recover for causing the death of a passerby, who was asked by an employee of the contractor to "give us a hand" for the purpose of moving the car, and, as he was complying with the request, was killed, it was held that the questions, whether the decedent was in the exercise of due care or had assumed the risk of the injury, and whether the defendant was liable, were for the jury. *Sandon v. Kendall*, 292.

In an action by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife by reason of the giving way of a railing of a piazza, where it was alleged in two counts of the declaration that the landlord had undertaken to repair and had repaired negligently, it was held that the evidence at the trial entitled the plaintiff to go to the jury on two counts because his intestate, the tenant's wife, belonged to the class contemplated by the parties as entitled to use the demised premises. *Bergeron v. Forest*, 392.

If the landlord under the tenancy above described undertakes gratuitously to make certain repairs, and the death of the person, with whom he so undertakes, is caused by ordinary negligence on his part, he is liable, under R. L. c. 171, § 2, as amended by St. 1907, c. 375, for causing such death, but he is not liable for the death of any other person caused under such circumstances by either ordinary or gross negligence on his part. *Ibid*.

Evidence at the trial of the same action was held to warrant a finding that repairs upon the railing were made under the authority of the defendant. *Ibid*.

In the same case it was held that, on the evidence, it could not be ruled as a matter of law that the plaintiff's intestate assumed the risk of her injury. *Ibid*.

Res ipsa loquitur.

In an action at common law against an employer by an administrator for personal injuries sustained by his intestate, alleged to have been due to negligence chargeable to the employer, it was held that this court could not say that the accident was one which in the ordinary experience of mankind would not have happened without negligence on the part of the employer or of one for whose negligence he was responsible, and consequently that the doctrine of *res ipsa loquitur* had no application. *McAller v. Gillett*, 95.

Violation of Statute as Evidence of Negligence.

Upon evidence which tends merely to show that, at a certain station the cars of a street railway company were always filled with passengers at a certain hour of the day and that on a certain morning a car was so crowded that the guard "had to press the doors in," and that the pushing of the crowd thrust a passenger out of the door and caused him to fall into the street, St. 1906, c. 463, Part III, § 96, was held not to be applicable in an action against the street railway company for personal injuries received by such passenger. *Knowles v. Boston Elevated Railway*, 347.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

Notice of contract which is necessary, under the provisions of St. 1915, c. 292, § 2, as amended by St. 1916, c. 306, § 1, as a foundation for a mechanic's lien. *Pratt & Forrest Co. v. Strand Realty Co. of Lowell*, 314.

A general notice by publication of a petition for the allowance of a will and the mailing of copies of such notice to all persons interested in the estate of the alleged testator are sufficient for the purpose of allowing the will, even if the notice failed to reach the next of kin of the alleged testator. *Renwick v. Macomber*, 530.

NUISANCE.

The consequence of one permitting a nuisance, such as an unregistered motor vehicle operated upon a highway, is that he is responsible for injuries caused thereby even although such vehicle is at the moment when such injuries are caused being used in the business or pleasure of another. Per Rugg, C. J. *Gondek v. Cudahy Packing Co.* 105.

In an action against the person in control of real estate for personal injuries sustained from falling on ice on a public sidewalk alleged to have been formed by water coming from a conductor on the premises of the defendant, it was held that the plaintiff was entitled to go to the jury, the fact, that the water was poured from the spout fell, not upon the sidewalk, but upon the sloping bank some feet back from the street, not being conclusive against the plaintiff. *Cochran v. Barton*, 147.

ORDER.

An order by a building contractor directing the owner of a building to pay to a subcontractor a certain sum out of a balance due the contractor, is as between the parties an assignment when delivered to the owner. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

An order by a creditor upon his debtor to pay less than the whole of the debt to a third person, was held to be valid as an assignment and enforceable in a suit in equity although it could not be enforced in an action at law. *Ibid.*

In a suit in equity to enforce an assignment by a contractor to a subcontractor a proper decree is one directing the owner to pay to the subcontractor the amount of the order with interest from the filing of the bill, and, where

the contractor was adjudicated a bankrupt, to pay the balance of the debt due to the contractor to his trustee in bankruptcy. *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 20.

PARTNERSHIP.

In an action for personal injuries sustained by a member of the crew of a vessel in loading gasoline, it was held that the question, whether the responsibility for the negligence was confined to the master as employer or owner *pro hac vice*, or was that of all the owners as partners in the enterprise, for whom the master was the agent, was a question for the jury on the evidence. *Cambra v. Santos*, 131.

Where in the same case it appeared that the plaintiff was employed under the terms known as the "Provincetown lay," it was held that there was evidence that the plaintiff plainly was an employee and that the shares given to him and the other members of the crew did not create a partnership. *Ibid.*

Upon a master's report of the facts, in a suit in equity brought by one of three parties to a real estate transaction against the heirs at law of the other two, it was held that it could not be said that, in the absence of an agreement that the three parties should associate together as partners in the enterprise, the reported facts constituted them partners. *Magee v. Magee*, 341.

In a suit in equity by the survivor of three parties who jointly furnished the consideration for the purchase of certain real estate, title to which was taken in the name of the other two, in which the heirs at law of the other two were defendants, it was held that a motion by the defendants, for leave to amend their answer by setting up the claim that the transaction was one of a partnership, rightly was denied. *Ibid.*

In the determination of questions as to the propriety of the investment by the trustee of a portion of the funds of a trust under a will, in the preferred shares of the Massachusetts Electric Companies, a voluntary corporation created by a declaration of trust, it was held that it was not necessary to determine whether the agreement and declaration of trust constituted a partnership among the shareholders, or a trust. *Kimball v. Whitney*, 321.

In an action upon certain promissory notes against all the shareholders of a voluntary association under a declaration of trust which, in *Frost v. Thompson*, 219 Mass. 360, was held to be a partnership and not a trust, it was held that the association and the individual shareholders were bound by the acts of the acting treasurer in signing and indorsing the notes in question and that a finding for the plaintiff was warranted. *Horgan v. Morgan*, 381.

In a suit in equity by a mining engineer against a promoter to compel the defendant to assign to the plaintiff certain shares in a mining corporation, it was held that no partnership or fiduciary relation was created by a certain agreement in the form of a letter from the defendant to the plaintiff. *Ross v. Burrage*, 439.

PAYMENT.

A gratuitous promise to discharge a debt evidenced by a note secured by a mortgage of real estate, not accompanied by the redelivery of the note or

mortgage or by the execution or delivery of any instrument to carry out the promise, does not extinguish the debt nor, after the death of the mortgagee, give to the mortgagor a right to maintain a suit in equity to enjoin the foreclosure of the mortgage by the administrator of his estate. *Cardoza v. Leveroni*, 310.

PERPETUITIES, RULE AGAINST.

Where by her will a mother gave a life estate to her son with power of appointment among her "lineal heirs" in the event of his dying leaving no issue, and the son provided by his will that a portion of the fund should be held in trust for the benefit of a niece of the son during her life, but if she should die leaving no issue surviving her, then the said portion to go "to the lineal heirs of" the testator's mother, it was held that the trust provision was not void as a violation of the rule against perpetuities. *Ernst v. Rivers*, 9.

PHOTOGRAPH.

Use in evidence, see appropriate subtitle under EVIDENCE.

PHYSICIANS AND SURGEONS.

Only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent, in this Commonwealth, to give their opinion as to the testator's mental condition. *Old Colony Trust Co. v. Di Cola*, 119.

The mere fact that a witness is a surgeon or a physician does not of itself qualify him as an expert in mental diseases. *Ibid.*

Upon the fact which appeared at the trial of an issue as to whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental diseases. *Ibid.*

PLEADING, CIVIL.

Where, in an action against a railroad company, a plea in abatement was filed based upon "General Order 18-A," issued by the Director General of railroads, which it appeared had not been issued until after the commencement of the action in which the plea in abatement was filed, its provisions could not be relied on in support of the plea. *West v. New York, New Haven, & Hartford Railroad*, 162.

PLEDGE.

Construction of a provision in a promissory note, interest on which was paid six months in advance, that, upon the happening of a certain event, the note immediately should become due and payable, and that the bank holding such note might sell collateral pledged to secure the note and apply

Pledge (continued).

the net proceeds "to the payment of any or all the liabilities aforesaid, with interest thereon to maturity." *Gaston v. Boston Penny Savings Bank*, 23.

Where a loan is secured by a pledge of collateral, with a contract containing a power of sale clause which is enforceable if, and when, the borrower makes an assignment for the benefit of creditors, the assignees of the borrower are entitled to recover from the lender in an action of contract any interest in excess of that which shall have accrued to the date of the sale of the collateral, whether such excess was prepaid or was retained from the net proceeds of the sale. *Ibid.*

In a suit in equity by a corporation to set aside a sale by the defendant, of bonds pledged by the plaintiff to secure the payment of a note of the plaintiff, in which it appeared that the defendant had recovered judgment against the plaintiff in an action on the note, and thereafter, acting under a power of sale granted by the terms of the note had sold the bonds held as collateral at public auction and bought them himself for \$15, it was held that the evidence as to the good faith of the defendant as to the giving of notice and as to the time, place, conduct and circumstances of the sale, was such as to warrant the findings of the judge dismissing the bill. *Winchester Rock & Brick Co. v. Murdough*, 50.

Under an agreement pledging certain personal property to secure the payment of a note of the pledgor, the pledgee, in any sale of the pledged property made after the pledgor becomes bankrupt, must act in good faith and use every reasonable effort to protect the interest of the pledgor. *Whitman v. Boston Terminal Refrigerating Co.* 386.

If the pledgee, in the agreement above described, is a corporation doing business in Boston, whose entire common stock is owned by a corporation doing business in Springfield, by which it is managed and controlled, and, acting under orders of and in combination with the Springfield corporation, upon the bankruptcy of the pledgor, for the sole purpose of benefiting the two corporations, sells and ships the pledged property to the Springfield corporation at a price below the market price and it is sold by the Springfield corporation within thirty days at a very substantial profit, such a sale to the Springfield corporation may be found to be fraudulent and voidable at the election of the pledgor and to amount to a conversion. *Ibid.*

It is not a condition precedent to a right on the part of the trustee in bankruptcy under the circumstances above described to maintain an action of tort for conversion against the pledgee and the Springfield corporation that a tender first should be made to the pledgee of the amount to secure which the pledge was made, since the pledgee had put it out of his power to return the property. *Ibid.*

In an action against a pledgee and a confederate for conversion of the pledged property by a wrongful sale, the plaintiff may recover the fair market value of the pledged property less the amount of the debt for which the goods were pledged. *Ibid.*

POOR DEBTOR.

In an action against the surety on a poor debtor's recognizance for an alleged breach of the recognizance by the debtor, an application in writing to take the oath for the relief of poor debtors purporting to be signed by an at-

torney in behalf of the debtor, which is no part of the record, offered in evidence by the plaintiff, must be excluded. *McKeon v. Briggs*, 99.

Where the record in the poor debtor proceedings shows that the debtor delivered himself up for examination in accordance with R. L. c. 168, § 30, on a day within thirty days from the day of his arrest, and gave notice of his desire to take the oath for the relief of poor debtors, the record is conclusive and binding upon the parties and cannot be contradicted or controlled by extrinsic evidence. *Ibid.*

In such an action, where the record of the poor debtor proceedings shows that the debtor within thirty days from the day of his arrest personally appeared in court and made the application to take the oath, the plaintiff cannot be permitted to testify that the debtor told him that he never had been in the poor debtor session before the day finally fixed for the hearing. *Ibid.*

In an action against the surety on a poor debtor's recognizance the burden is on the plaintiff to show that there has been a breach of the recognizance. *Ibid.*

In the case above described it was held that a poor debtor in surrendering himself and making his application to take the oath need not be in the actual presence of the magistrate, if the court is in session and the magistrate is at hand and is readily accessible for the transaction of such business as properly may be presented to him. *Ibid.*

In the action above described, it was said that it was unnecessary to determine whether the creditor's counsel by his appearances at the hearings and other acts, without raising any objection to the regularity of the proceedings, had waived the right to object to any failure of the debtor properly to surrender himself for examination or to any want of jurisdiction in the court over the person of the debtor, because as matter of law the evidence did not warrant a finding that there had been any breach of the recognizance. *Ibid.*

PRACTICE, CIVIL.

Amendment of Record.

An exception to the denial of a motion to amend a record, where the evidence as to the correctness of the record is conflicting, must be overruled. *McNeil v. Middlesex & Boston Street Railway*, 254.

Whether an appeal will lie from orders denying a motion that a defendant disclose the names and addresses of his witnesses and a motion to amend the record so that it would show that a motion for further answers to interrogatories was denied, was not determined; but it was stated that exceptions were recognized as a preferable way of presenting such questions. *Ibid.*

Interrogatories.

Whether an appeal will lie from orders denying a motion that a defendant disclose the names and addresses of his witnesses and a motion to amend the record so that it would show that a motion for further answers to interrogatories was denied, was not determined; but it was stated that ex-

Practice, Civil (continued).

ceptions were recognized as a preferable way of presenting such questions. *McNeil v. Middlesex & Boston Street Railway*, 254.

The granting of a motion, that a defendant in an action of tort against a street railway company for damages to the plaintiff's horse and wagon caused by a collision with a street car of the defendant, disclose to the plaintiff the names and addresses of its witnesses, is, by St. 1913, c. 815, § 3, a matter of discretion, and an exception to a denial of the motion must be overruled. *Ibid.*

Issues for Jury.

It appearing that the jury were not asked to consider evidence regarding an alleged custom requiring landlords in a certain district to make repairs, in connection with counts in the declaration which relied on a gratuitous undertaking with the wife of a tenant, at the trial of an action against the landlord for negligence in causing her conscious suffering and death, it was held that, ordinary negligence of the defendant being conceded, the count of the declaration which alleged negligence of the defendant as the cause of the death of the wife properly was submitted to the jury. *Bergeron v. Forest*, 392.

Rules of Court.

Equity Rule 36. *Crowell v. Davis*, 136.

Equity Rule 37. *White v. White*, 39.

Rule 55 of the Superior Court (1915). *Leland v. United Commercial Travelers of America*, 558.

Law or Fact.

Where there was conflicting evidence as to whether one was an agent with authority to bind his alleged principal by substituting a recognizance for a bail bond and another surety for a surety company, the fact of agency and its scope was for the jury to determine. *National Surety Co. v. Nazzaro*, 74.

Nonsuit.

The fact that, after the plaintiff's failure to furnish an indorser on his writ, a motion of the defendant to nonsuit the plaintiff was continued by the judge of his own motion without solicitation on the part of the plaintiff, could give the plaintiff no ground for complaint, even if he had excepted to the action of the judge, which here he did not. *Keown v. Hughes*, 1.

Ordering of Verdict.

At a trial where the facts are not in dispute the presiding judge properly may order a verdict for the plaintiff upon a ruling of law. *Graves v. Apt*, 587.

Conduct of Trial.

Discretionary control of examination of witness.

In an action against a landlord for causing conscious suffering and death of his tenant's wife, where the defendant was called as a witness by the plaintiff, and upon examination was required to answer questions as to repairs made on the premises and as to whether he had authorized them, it was held

that there was no error in permitting such examination. *Bergeron v. Forest*, 392.

Admission of photographs in evidence.

The admission in evidence of photographs rests largely in the discretion of the presiding judge. *Morrissey v. Connecticut Valley Street Railway*, 554.

Remarks of counsel.

Certain remarks of counsel, occurring after the denial of a motion by him in his client's behalf and the refusal of certain requests by him for rulings, were held not to have constituted a waiver of the requests. *Gondek v. Cudahy Packing Co.* 105.

Requests, rulings and instructions.

A request for an instruction to a jury, which is framed in an argumentative form and emphasizes facts selected by the party making the request in his interest, need not be granted. *Whitman v. Fournier*, 154.

A request for a ruling, which assumes as true a fact as to which the evidence is conflicting, need not be given. *McNeil v. Middlesex & Boston Street Railway*, 254.

Where at the trial of an action of tort the evidence on the question of liability is conflicting, a ruling, that on all the evidence the plaintiff was entitled to recover, must be denied. *Ibid.*

At such a trial the judge need not give a ruling, that "there is no absolute rule of law that a person driving across a street in a city, in crossing the tracks of a street railway in a public street where the cars have not an exclusive right of way . . . must look and listen for an approaching car before entering upon the tracks of the electric railway," even if it is a correct statement of the law. *Ibid.*

In an action for the breach of certain contracts between a distributor of moving picture films and a theatre owner, each of which contained a clause providing that either party by notice given within ten days after the exhibition of any picture, might limit the contract to one additional picture upon the delivery of which the contract should terminate, it was held that an instruction given by the judge that, in determining the extent of the plaintiff's damages, the possibility of termination of the contracts should be considered, was sufficiently favorable to the defendant. *Orbach v. Paramount Pictures Corp.* 281.

Where at the trial of an issue submitted to the Superior Court upon an appeal by an administratrix from a decree of the Probate Court disallowing a personal claim of her's against the estate on a promissory note, the respondents excepted to certain portions of the charge to the jury, it was held that the special finding of the jury that there was a consideration for the note as between father and son rendered the exception to the instruction immaterial. *Crowdis v. Hayward*, 377.

Because of the error at the trial of an action against a landlord by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife, which related to both counts as to the conscious suffering of the plaintiff's intestate, it was held that the defendant's exceptions must be sustained and there must be a new trial confined to those two counts. *Bergeron v. Forest*, 392.

Practice, Civil (*continued*).

Where a request for a ruling, although not strictly accurate, was sufficient to direct the judge's attention to an important principle of law, which in his charge he had omitted, it was held that in failing to advert to it harmful error was committed. *Bergeron v. Forest*, 392.

In an action for personal injuries from being run into by a motor truck, where the judge refused a request to rule that, if the driver of the truck was driving for the sole purpose of going to his own home, he was acting outside the scope of his employment, and instructed the jury instead as follows: "I shall leave the question to you whether on that evening ride [the driver] was acting within the scope of the business of his employer, and I shall say to you probably that unless you find that one of the purposes, one of the objects of that ride was to learn to use the car, that there was nothing here that would warrant you in finding that he was within the scope of the defendant's authority," it was held that the instruction requested should have been given, and that the instruction given was rendered erroneous by the use of the word "probably." *McGrath v. Wehrle*, 456.

A presiding judge properly may refuse to make a ruling singling out specific facts for special treatment. *Morrissey v. Connecticut Valley Street Railway*, 554.

Judge's charge.

Exceptions by the defendant to certain portions of the charge to the jury in an action against a physician and surgeon for negligent treatment were sustained because such portions of the charge violated the principle of law that the liability of the defendant was to be determined upon proof that it was reasonably probable that good results would come from an operation performed by the defendant with the ordinary skill possessed by surgeons in similar communities. *Tucker v. Stetson*, 81.

Where at the trial of an action against an elevated railway company for personal injuries, the judge, in his charge, used the expressions, "see if there is anybody . . . of whom you can say, 'I am convinced by that person'"; and, discussing the testimony of the experts, "You may pick out one or two of those men that you say you will stand by," it was held that although, taken by themselves, the expressions of the judge above quoted were objectionable, no substantial error appeared when the charge was considered as a whole. *Cronin v. Boston Elevated Railway*, 243.

General exceptions to specific portions of a charge to a jury, where there were no requests for rulings on the subject matter of the exceptions, will not be sustained unless substantial error or injustice plainly appears. *Ibid.*

Because of the error at the trial of an action against a landlord by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife, which related to both counts as to the conscious suffering of the plaintiff's intestate, it was held that the defendant's exceptions must be sustained and there must be a new trial confined to those two counts. *Bergeron v. Forest*, 392.

Verdict.

In an action against a landlord by the administrator of the estate of the wife of a tenant at will for conscious suffering and death of the wife, the jury found for the plaintiff in a single verdict, general respecting the counts

and specifying that they assessed a certain amount of damages for the intestate's conscious suffering and a certain amount for the causing of her death, it was held that, because there was no error at the trial as to the count for death caused by negligent performance of a gratuitous undertaking with the intestate, the finding of the jury and their assessment of damages for causing the death, being general and warranted under one of the pertinent counts, should stand, although there was error at the trial as to the other count on that subject. *Bergeron v. Forest*, 392.

Where a declaration in an action of tort contains counts alleging liability of the defendant upon different grounds and the jury return a general verdict for the plaintiff, the verdict, in the absence of other reversible error, must stand if there was sufficient evidence to warrant a finding for the plaintiff upon any count. *Ibid.*

New Trial.

The denial of a motion for a new trial that has reference only to questions of law which might have been raised at the trial is wholly within the discretion of the judge. *Crowdis v. Hayward*, 377.

Because of the error at the trial of an action against a landlord by the administrator of the estate of the wife of a tenant at will for causing conscious suffering and death of the wife, which related to both of the counts as to the conscious suffering of the plaintiff's intestate, it was held that the defendant's exceptions must be sustained and there must be a new trial confined to these two counts. *Bergeron v. Forest*, 392.

Costs.

Although ordinarily objection to the failure of a non-resident plaintiff to furnish an indorser for costs under R. L. c. 173, § 39, is taken to have been waived if such objection was not made at the first term of court after the entry of the writ, yet, where the plaintiff's non-residence was not disclosed on the pleadings and was not known to the defendant, this rule does not apply. *Keown v. Hughes*, 1.

An order, that the plaintiff furnish an indorser for costs, which does not specify the amount the indorser should be responsible for, is valid and not void for obscurity. *Ibid.*

The provisions in R. L. c. 173, §§ 39-43, requiring a non-resident plaintiff to furnish an indorser for costs, is constitutional. *Ibid.*

The decision in *Keown v. Hughes*, ante, 1, affirmed. *Keown v. Trudo*, 19.

Equitable Defence.

A plaintiff, who in an action at law was sued as one of the executors of a will, did not waive his right to assert his individual claim as devisee and legatee under the will by failing to set up as executor in the action at law the equitable defence of election under R. L. c. 173, § 28, as amended by St. 1913, c. 307. *Noyes v. Noyes*, 55.

In the same case it also was held that a denial in the action at law of a motion of the present plaintiff as one of the executors, for a new trial in which to set up the principle of election, did not affect the plaintiff's individual right to relief in the present suit. *Ibid.*

Indorser of Writ.

Although ordinarily objection to the failure of a non-resident plaintiff to furnish an indorser for costs under R. L. c. 173, § 39, is taken to have been waived if such objection was not made at the first term of court after the entry of the writ, yet, where the plaintiff's non-residence was not disclosed on the pleadings and was not known to the defendant, this rule does not apply. *Keown v. Hughes*, 1.

An order, that the plaintiff furnish an indorser for costs, which does not specify the amount for which the indorser should be responsible, is valid and not void for obscurity. *Ibid.*

The provisions in R. L. c. 173, §§ 39-43, requiring a non-resident plaintiff to furnish an indorser for costs, is constitutional. *Ibid.*

The fact that, after the plaintiff's failure to furnish an indorser on his writ, a motion of the defendant to nonsuit the plaintiff was continued by the judge of his own motion without solicitation on the part of the plaintiff, could give the plaintiff no ground for complaint, even if he had excepted to the action of the judge, which here he did not. *Ibid.*

It is no ground for invalidating an order to the plaintiff to furnish surety for costs, that the judge who made it allowed in evidence the pleadings in another action to show that the plaintiff was not an inhabitant of the Commonwealth, if no exception was taken to the admission of this evidence and there does not appear to have been any error in admitting it. *Ibid.*

An order to the plaintiff to furnish an indorser for costs cannot be declared void on the ground that the judge who made it refused to admit evidence offered by the plaintiff, if no evidence thus offered is set forth in the record and no exception was taken to the exclusion of any evidence offered by the plaintiff. *Ibid.*

The decision in *Keown v. Hughes*, *ante*, 1, affirmed. *Keown v. Trudo*, 19.

Exceptions.

An order to the plaintiff to furnish an indorser for costs cannot be declared void on the ground that the judge who made it refused to admit evidence offered by the plaintiff, if no evidence thus offered is set forth in the record and no exception was taken to the exclusion of any evidence offered by the plaintiff. *Keown v. Hughes*, 1.

It is no ground for invalidating an order to the plaintiff to furnish an indorser for costs, that the judge who made it allowed in evidence the pleadings in another action to show that the plaintiff was not an inhabitant of the Commonwealth, if no exception was taken to the admission of this evidence and there does not appear to have been any error in admitting it. *Ibid.*

The fact that, after the plaintiff's failure to furnish an indorser on his writ, a motion of the defendant to nonsuit the plaintiff was continued by the judge of his own motion without solicitation on the part of the plaintiff, could give the plaintiff no ground for complaint, even if he had excepted to the action of the judge, which here he did not. *Ibid.*

The decision in *Keown v. Hughes*, *ante*, 1, affirmed. *Keown v. Trudo*, 19.

General exceptions to specific portions of a charge to a jury, where there were no requests for rulings on the subject matter of the exceptions, will not be

sustained unless substantial error or injustice plainly appears. *Cronin v. Boston Elevated Railway*, 243.

Where, in direct examination of the plaintiff's driver at the trial of an action of tort against a street railway for damages to the plaintiff's horse and wagon, he had testified that the street car struck his left rear wheel, an exception to a refusal to permit the same witness to be asked in rebuttal whether the street car struck the front of the wagon must be overruled, the subject matter of the question being a part of the plaintiff's case in chief and its exclusion in rebuttal being a matter of discretion. *McNeil v. Middlesex & Boston Street Railway*, 254.

The granting of a motion, that a defendant in an action of tort against a street railway company for damages to the plaintiff's horse and wagon caused by a collision with a street car of the defendant, disclose to the plaintiff the names and addresses of its witnesses, is, by St. 1913, c. 815, § 3, a matter of discretion, and an exception to a denial of the motion must be overruled. *Ibid.*

Whether an appeal will lie from orders denying a motion that a defendant disclose the names and addresses of his witnesses and a motion to amend the record so that it would show that a motion for further answers to interrogatories was denied, was not determined; but it was stated that exceptions were recognized as a preferable way of presenting such questions. *Ibid.*

An exception to the denial of a motion to amend a record, where the evidence as to the correctness of the record is conflicting, must be overruled. *Ibid.*

Where, at the trial of an action of tort for damages to a horse and wagon the property of the plaintiff, caused by collision with a street car, the plaintiff was permitted to testify as to the value of the property before and after the collision, he is not harmed by not being permitted to ask his driver how much the horse depreciated in value because of the collision nor by not being permitted himself to testify how much a new horse cost. *Ibid.*

Where at the trial of an issue submitted to the Superior Court upon an appeal by an administratrix from an adverse decree of the Probate Court disallowing a personal claim of her's against the estate on a promissory note, the respondents excepted to certain portions of the charge to the jury, it was held that the special finding of the jury that there was a consideration for the note as between father and son rendered the exception to the instruction immaterial. *Crowdis v. Hayward*, 377.

Where a request for a ruling, although not strictly accurate, was sufficient to direct the judge's attention to an important principle of law, which in his charge he had misstated, it was held that harmful error thus was committed. *Bergeron v. Forest*, 392.

Report.

Rule 55 of the Superior Court (1915) was not intended to deprive a trial judge of the power given him by R. L. c. 173, § 105, as amended by St. 1917, c. 345, to make a report in the exercise of his sound discretion in order to forward the ends of justice. *Leland v. United Commercial Travelers of America*, 558.

Appeal.

Whether an appeal will lie from orders denying a motion that a defendant disclose the names and addresses of his witnesses and a motion to amend the record so that it would show that a motion for further answers to interrogatories was denied, was not determined; but it was stated that exceptions were recognized as a preferable way of presenting such questions. *McNeil v. Middlesex & Boston Street Railway*, 254.

PRACTICE, CRIMINAL.

Report.

After the conviction of a defendant in the Superior Court for a criminal offence, a report of the trial judge under R. L. c. 219, § 34, at the request of such defendant, of a question of law, should be signed by the judge and should state the question of law and recite or refer to facts or parts of the record sufficient to make intelligible the question of law reported. *Commonwealth v. O'Neil*, 535.

In the same case it was pointed out that the word "Memorandum" is not an accurate designation of such a report. *Ibid.*

PROBATE COURT.

Jurisdiction.

When an appeal is pending from a decree of the Probate Court allowing the will of an alleged testator, the Probate Court under R. L. c. 137, §§ 10, 11, may authorize a special administrator of the testator's estate to prosecute a pending suit in equity brought by the testator in his lifetime to procure a reconveyance of real estate. *Purcell v. Purcell*, 62.

Where an heir at law domiciled in Germany, who had appeared by attorney prior to the declaration of war and had also joined with others in an appeal to the Supreme Judicial Court from the decree allowing the will, filed a motion *in limine* praying that the litigation as to the validity of the will should be suspended until the cessation of hostilities, it was held that the motion was properly denied and such denial was not contrary to the provisions of the "Act to define, regulate and punish trading with the enemy, and for other purposes," U. S. St. 1917, c. 106, nor to any provision of the Hague Convention of 1907, nor to the general principles of the common law. *Riddell v. Fuhrman*, 69.

Evidence upon which it was held that the Probate Court has no power to vacate a decree made by that court, many years before, allowing a certain will even assuming that the executor perpetrated a fraud upon the Probate Court in procuring the allowance of the will. *Renwick v. Macomber*, 530.

A general notice by publication of a petition for the allowance of a will and the mailing of copies of such notice to all persons interested in the estate of the alleged testator are sufficient for the purpose of allowing the will, even if the notice failed to reach the next of kin of the alleged testator. *Ibid.*

Motion in Limine.

Where an heir at law domiciled in Germany, who had appeared by attorney prior to the declaration of war and had also joined with others in an appeal to the Supreme Judicial Court from the decree allowing the will, filed a motion *in limine* praying that the litigation as to the validity of the will should be suspended until the cessation of hostilities, it was held that the motion was properly denied and such denial was not contrary to the provisions of the "Act to define, regulate and punish trading with the enemy, and for other purposes," U. S. St. 1917, c. 106, nor to any provision of the Hague Convention of 1907, nor to the general principles of the common law. *Riddell v. Fuhrman*, 69.

Master.

Where the conclusion of a master was that a marriage in Rhode Island which was irregular according to one section of the statute of Rhode Island, but under another section of that statute, if otherwise valid, was valid, in spite of such irregularity, it was held that the master's construction of the statute was correct. *Martin v. Otis*, 491.

Decree.

Where, by the provisions of a certain will, the interest of the son of the testator in a trust was inalienable and non-assignable and an agreement for a compromise of a controversy concerning the will struck out such provision and inserted a clause providing for a trust which gave the son an interest which was assignable, which agreement was assented to by all parties in interest, and, upon a suit in equity in the Supreme Judicial Court under R. L. c. 148, §§ 15-18, a decree ratifying and confirming the agreement was entered, such decree, whether erroneous or not, cannot be attacked by the son in defence of a suit by a trustee, to whom the son assigned his interest under the trust, to enforce the assignment, but stands as the law of that case. *Woodard v. Snow*, 267.

Findings of a master that a surviving husband, although his marriage to an intestate was lawful, was not a suitable person to administer the estate of his wife were held to furnish adequate ground for reversing a decree of the Probate Court appointing the husband administrator. *Martin v. Otis*, 491. A rescript of this court not followed by a final decree of the trial court cannot be set up as *res judicata*. *Renwick v. Macomber*, 530.

Revocation of Decree.

Evidence upon which it was held that the Probate Court has no power to vacate a decree made by that court, many years before, allowing a certain will even assuming that the executor perpetrated a fraud upon the Probate Court in procuring the allowance of the will. *Renwick v. Macomber*, 530.

Appeal.

Where on an appeal from a decree of a single justice of the Supreme Judicial Court allowing a petition brought under R. L. c. 162, § 13, to enter and prosecute an appeal from a decree of the Probate Court allowing an alleged

Probate Court (*continued*).

will, the record showed that the alleged testatrix left also an earlier will, dated ten years before the one allowed, and that the petitioners, named as legatees in the earlier will, had no knowledge of its existence until after the time for filing an appeal from the decree allowing the later will had expired, it was held, that it must be assumed that in granting the petition to enter the appeal the single justice found that the failure to claim an appeal was without default on the part of the petitioners and that justice required a revision of the case, and that the ruling, that the petitioners as matter of law were persons who might be found to have been aggrieved by the decree, was right. *Crowell v. Davis*, 136.

In the same case where it appeared that an heir at law of the alleged testatrix had filed seasonably an appeal from the decree of the Probate Court allowing the alleged last will, it was pointed out that this appeal might be waived at any time, and therefore did not protect the rights of legatees named in an earlier will, who were aggrieved by the allowance of the alleged last will. *Ibid.*

In the case above described, the discretionary power vested in the court under R. L. c. 162, § 13, cannot be said to have been improperly exercised. *Ibid.*

Findings of a master that a surviving husband, although his marriage to an intestate was lawful, was not a suitable person to administer the estate of his wife, were held to furnish adequate ground for reversing a decree of the Probate Court appointing the husband administrator. *Martin v. Otis*, 491.

PROXIMATE CAUSE.

Upon the evidence at the trial of an action on an accident insurance certificate not to be payable "unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of the death, disability or loss," it was held that under the terms of the contract the plaintiff could not recover. *Leland v. United Commercial Travelers of America*, 558.

PUBLIC SERVICE COMMISSION.

In an action by one railroad corporation against another for the defendant's refusal to take a lease of the plaintiff's railroad, which refusal constituted an alleged breach of a so called "Agreement for Lease" executed under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, where, by the agreement sued upon, the parties covenanted to execute a lease "as the same may be modified by the Railroad Commission of Massachusetts," it was held that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained. *Hampden Railroad v. Boston & Maine Railroad*, 411.

The jurisdiction given to the Supreme Judicial Court by St. 1913, c. 784, § 27, in equity to review, annul, modify or amend any rulings or orders of the public service commission extends to an order made by that commission in regard to the consolidation of the railroad companies constituting the Boston and Maine Railroad system and the reorganization of that system

under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323. *Brown v. Boston & Maine Railroad*, 502.

Sections 2 and 6 of Spec. St. 1915, c. 380, giving the public service commission authority to approve certain acts of the Boston and Maine Railroad after notice and hearing, lawfully confer upon the commission administrative powers and *quasi* judicial functions. *Ibid*.

The approval, in the order of the public service commission above referred to, of the issue by the Boston and Maine Railroad, upon vote of two thirds in interest of the common stock of that corporation, at any time before January 1, 1924, of one hundred and twenty thousand shares of first preferred stock at the par value of \$12,000,000 for the purpose of paying an equal amount at par of bonds issued under the reorganization plan for the payment of the floating indebtedness; was held to be valid under the circumstances shown. *Ibid*.

On a bill in equity under St. 1913, c. 784, § 27, by minority stockholders of the Boston and Maine Railroad to review an order of the public service commission approving the agreement for the consolidation of the Boston and Maine Railroad system and the plan for the reorganization of that system, it was held that certain notes of the Boston and Maine Railroad outstanding on March 31, 1915, amounting to \$13,306,000, constituted a valid debt. *Ibid*.

Where the plaintiffs in their brief in a suit in equity to review an order of the public service commission in regard to a consolidation of railroad companies and the reorganization of a railroad system declined to discuss the validity of an "alleged debt" of \$13,306,000, which was to be paid under the plan of reorganization, further than to restate their previous contentions, and the record discloses evidence sufficient to determine the validity of this indebtedness, it was held that this equivocal position of the plaintiffs was not to be treated as an admission or a waiver, and the court proceeded to decide the question. *Ibid*.

RAILROAD.

In an action by one railroad corporation against another for the defendant's refusal to take a lease of the plaintiff's railroad, which refusal constituted an alleged breach of a so called "Agreement for Lease," executed under the power given by St. 1906, c. 463, Part II, § 209, as amended by St. 1907, c. 585, § 8, by which agreement the defendant covenanted "to execute the lease . . . as the same may be modified by the Railroad Commission of Massachusetts," it was held that the parties to the alleged "agreement for lease" had no power under the statute or otherwise to make an agreement to execute a lease upon terms to be determined afterwards and that the action could not be maintained. *Hampden Railroad v. Boston & Maine Railroad*, 411.

The Boston and Albany Railroad Company, which leased its entire property to the New York Central and Hudson River Railroad Company with the approval of the Commonwealth as given by St. 1900, c. 468, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and is not subject to the tax imposed by that statute. *Attorney General v. Boston & Albany Railroad*, 460.

Facts upon which the Ware River Railroad Company was held not to be a

Railroad (*continued*).

corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly is not subject to the tax imposed by that statute. *Attorney General v. Ware River Railroad*, 466.

Consolidation and Reorganization.

It is lawful for the Legislature to provide in enacting a general plan for the consolidation of several railroads that an existing corporation, to which the others become joined, shall assume and pay or provide for the payment or refunding as its own debts of other subsidiary companies as part consideration for the purchase of their property and franchises which otherwise under existing law it would be unlawful for it to pay or refund. *Brown v. Boston & Maine Railroad*, 502.

The jurisdiction given the Supreme Judicial Court by St. 1913, c. 784, § 27, in equity to review, annul, modify or amend any rulings or orders of the public service commission extends to an order made by the commission in regard to the consolidation of the railroad companies constituting the Boston and Maine Railroad system and the reorganization of that system under Spec. St. 1915, c. 380, as extended by Spec. St. 1917, c. 323. *Ibid*.

RECOGNIZANCE.

Difference between a bail bond and a recognizance pointed out. *National Surety Co. v. Nazzaro*, 74.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

At a second trial of an action for rent where the defence alleged is eviction and surrender of the lease, evidence offered by the defendant to prove such eviction and surrender by the same facts that were in evidence at the former trial, on which the trial judge found that there was no eviction and no accepted surrender, is not to be excluded as *res judicata*, no final judgment having been entered. *Reidy v. Kennedy*, 514.

Where in an action for divorce brought by a husband, it was held that a decree of the Probate Court on the petition of the wife for separate support, affirmed on appeal, to the effect that the husband had deserted his wife and that she was living apart from him for justifiable cause, was a bar to the maintenance of the libel. *Austin v. Austin*, 528.

A rescript of this court not followed by a final decree of the trial court cannot be set up as *res judicata*. *Renwick v. Macomber*, 530.

REVIEW.

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record, if it appears that the court had no jurisdiction of the case under the workmen's compensation act. *Sterling's Case*, 485.

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

RULES OF COURT.

Equity Rule 36. *Crowell v. Davis*, 136.Equity Rule 37. *White v. White*, 39.Rule 55 (1915) of the Superior Court. *Leland v. United Commercial Travelers of America*, 558.

SALE.

By Sample.

Evidence in an action by the seller against the buyer for the purchase price of goods destroyed in transit, of circumstances which, it was held, made inapplicable the rule that, where goods are sold by sample and are selected and shipped by the seller, the buyer has a right of inspection and verification before acceptance. *Levy v. Radkay*, 29.

Delivery.

Where goods, purchased by sample, were ordered by the buyer shipped to his address by a specified expressman, the charges to be paid by the buyer, and the goods while in the possession of the expressman were destroyed by fire, it was held in an action against the buyer for the purchase price, that the title to the goods passed to the buyer upon delivery to the expressman. *Levy v. Radkay*, 29.

Upon the evidence, at the trial of an action in the Municipal Court of the City of Boston for the price of goods sold and delivered, where the plaintiff delivered the goods to a carrier, who issued a non-negotiable bill of lading naming the defendant as consignee, of which the defendant had no notice, the bill of lading not being in evidence, it was held that it must be assumed, upon an appeal by the plaintiff from an order of the Appellate Division vacating a finding for the plaintiff and ordering judgment for the defendant, that the mere failure of the plaintiff to forward the non-negotiable bill of lading to the defendant had no effect upon the defendant's right to demand delivery of the goods. *Edelstone v. Schimmel*, 45.

Although a seller after delivering goods to the carrier, consigned to the buyer, notified the carrier not to deliver them to the buyer and wrote to the buyer asking him to pay the purchase price before it was due, these facts were held to be ineffectual to restore to the seller title to the goods which had vested in the buyer upon delivery to the carrier. *Ibid.*

In the action above described, it was held that the general finding by the trial judge for the plaintiff imported a finding that the goods were delivered to the defendant, and that such a finding was warranted by the evidence. *Ibid.*

Right of Inspection.

Where goods, sold and delivered by the seller to an expressman chosen by the buyer are destroyed by fire while in the hands of the expressman, the rule of law governing sales by sample, whereby the buyer has the right of in-

Sale (continued).

specion and verification before acceptance, is inapplicable. *Levy v. Radkay*, 29.

Repudiation.

Where, in confirmation of an oral contract of sale, a sales slip made by the vendor and handed to the purchaser contained a clerical error stating the price too low, and the purchaser seized upon such clerical error and persistently declared to the vendor that the slip as made expressed the true terms of the contract, such conduct on his part may be found to constitute a repudiation of the contract. *Edelstone v. Schimmel*, 45.

Sales of Merchandise in Bulk.

Evidence at the trial of an action against a deputy sheriff for an alleged conversion of certain property which had been attached by the defendant after it had been sold and transferred by a bill of sale to the plaintiff, which warranted a finding that the sale to the plaintiff was a sale in bulk of a part of his stock of merchandise, not in the ordinary course of trade, and therefore was voidable by the attaching creditor, the requirements of St. 1903, c. 415, in regard to the sale of merchandise in bulk not having been complied with. *Tupper v. Barrett*, 565.

In the case above described it was held that the property sold to the plaintiff could be found to be "merchandise" within the meaning of St. 1903, c. 415. *Ibid.*

SCHOOL AND SCHOOL COMMITTEE.

In St. 1917, c. 209, § 1, the words, "total local tax levy," mean the levy for all purposes, and not the levy for municipal purposes only. *Cambridge School Committee v. Mayor & City Council of Cambridge*, 6.

SHIP.

In an action of tort at common law against the master and owners of a fishing schooner by a member of the crew for personal injuries sustained from an explosion of gasoline, when it was being put into the gasoline tank of the schooner in Boston Harbor, it was held, that there was evidence that the plaintiff was set at work without warning in a place which could have been found to have been peculiarly dangerous under the circumstances. *Cambra v. Santos*, 131.

In an action at common law against the master and owners of a fishing vessel for personal injuries to a member of the crew from an explosion of gasoline while on board the vessel in Boston Harbor it was assumed, without the question being raised, that, his injury being a maritime tort, the workmen's compensation act has no application to it. *Ibid.*

Where in the same case it appeared that the plaintiff was employed under the terms known as the "Provincetown lay," it was held that there was evidence that the plaintiff plainly was an employee and that the shares given to him and the other members of the crew did not create a partnership. *Ibid.*

In an action for personal injuries sustained by a member of the crew of a vessel in loading gasoline it was held that the question, whether the respon-

sibility for the negligence was confined to the master as employer or owner *pro hac vice*, or was that of all the owners as partners in the enterprise, for whom the master was the agent, was a question for the jury on the evidence. *Cambra v. Santos*, 131.

An action of tort against the master and owners of a fishing schooner by a member of the crew for personal injuries, where it was held that the questions of due care of the plaintiff and of his assumption of risk were for the jury with the burden of proof on the defendants. *Ibid*.

An action of tort against the master and owners of a fishing schooner by a member of the crew for personal injuries, where it was held that it could not have been ruled that the master of the schooner, whether he was the owner of the schooner *pro hac vice* or was acting as the agent of all the owners, was a fellow servant of the plaintiff. *Ibid*.

SLANDER.

See LIBEL AND SLANDER.

SMALL LOANS ACT.

Renewal notes given from time to time, were held under the circumstances not to constitute new loans under the provision of § 51 of the small loans act, R. L. c. 102; and certain payments on account of principal and interest, it was held, must be treated as payments on account of the original loan and not as independent transactions. *Koltin v. Brown*, 16.

Where, in an action on the last renewal note given in a certain transaction, it appeared that, previous to the giving of the note, the sum of all payments on account of principal and of interest in excess of eighteen per cent per annum was sufficient fully to pay the original loan, the provisions of § 51 of the act applied, and it was held that, when the note in suit was given, the debt already had been discharged, so that the note was without consideration. *Ibid*.

SNOW AND ICE.

In an action against the person in control of real estate for personal injuries sustained from falling on ice alleged to have been formed on a public sidewalk by water coming from a conductor on the premises of the defendant, it was held that the plaintiff was entitled to go to the jury, the fact, that the water that was poured from the spout fell, not upon the sidewalk, but upon the sloping bank some feet back from the street, not being conclusive against the plaintiff. *Cochran v. Barton*, 147.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

Where, upon the reservation for determination of this court of a suit in equity for specific performance of an agreement to buy real estate which the plaintiffs as mortgagees had purchased at the foreclosure sale, it appeared that the plaintiffs alleged that no person in the military service of the United States had any interest in the premises, and no evidence on that issue was

Soldiers' and Sailors' Civil Relief Act (continued).

'presented, it was held that the suit must stand for a hearing of the question of fact, whether any person in the military service of the United States had any interest in the premises in question. *Morse v. Stober*, 223.

While the only way in which a mortgagee can be certain that the foreclosure of his mortgage will not be in violation of the Soldiers' and Sailors' Civil Relief Act, is to foreclose the mortgage under an order of a court of equity, nevertheless it is not impossible for a mortgagee, after purchasing the real estate at a foreclosure sale without such an order of a court, to prove beyond a reasonable doubt that no person in the military service of the United States had any interest, legal or equitable, in the premises in question so that he might maintain a suit in equity for specific performance against one who had agreed to purchase the property from him. *Ibid.*

STATUTE.

St. 1914, c. 553, affects procedure only, and therefore is applicable to an action brought in this Commonwealth for personal injuries suffered in another State. *Levy v. Steiger*, 600.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 741.

STREET RAILWAY.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

SUPERIOR COURT.

When in a suit in equity an order is made in the Superior Court that an appeal to this court shall be dismissed for want of prosecution unless it is entered in the clerk's office within ten days, the jurisdiction of the Superior Court is not brought to an end by the expiration of the ten days and, until the Superior Court has dismissed the petition on proof of the fact that the appeal was not entered within ten days, that court has jurisdiction of the case and although the ten days have expired can extend the time for entering the appeal. *Loonie v. Wilson*, 420.

Circumstances concerning an appeal from a final decree of the Superior Court, by reason of which it was held "with some hesitation" that this court could not say that no facts could have existed which would have warranted the Superior Court in coming to the conclusion that in case the appeal was completed by a certain date, which was two months and fifteen days after it was taken, it would be completed within the time specified in St. 1911, c. 284, § 1. *Ibid.*

SUPREME JUDICIAL COURT.

The full court has no power to decide abstract questions of law inapplicable to any subsisting right. *Sullivan v. Secretary of the Commonwealth*, 543.

Upon a petition for a writ of mandamus addressed to the Secretary of the Commonwealth commanding him to provide the petitioners with blanks for the use of subsequent signers of a petition filed under art. 48 of the Amendments to the Constitution asking for a referendum on a joint resolution of the General Court, it was held that the court had no power to pass upon an abstract question and that the petition must be dismissed. *Ibid.*

The full court in considering what justice requires as to the disposition of any case must consider changes in fact or in law or subsequent events decisively affecting the remedy sought, which are called in a proper manner to the attention of the court as having happened since the proceeding was instituted. *Ibid.*

Jurisdiction of the Supreme Judicial Court under St. 1913, c. 784, § 27, extends to a review of an order made by the public service commission in regard to the consolidation of the railroad companies constituting the Boston and Maine Railroad system. *Brown v. Boston & Maine Railroad*, 502.

TAX.

Constitutionality of Amendment.

In the absence of some binding contract, no one has a legal right to the continuance of existing laws as to taxation. *Massachusetts General Hospital v. Belmont*, 190.

St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, denying exemption from taxation to certain charitable corporations, does not deny to the Massachusetts General Hospital, owning property in the town of Belmont which is called the McLean Hospital and which is taxable under the provisions of the statute, the equal protection of the laws guaranteed both by the State and the Federal Constitutions. *Ibid.*

The enforcement of the statute above referred to as amended, by the collection by the town of Belmont of a tax upon property of the Massachusetts General Hospital known as the McLean Hospital, does not deprive the corporation of its property without due process of law. *Ibid.*

Nor does the removal of the exemption from taxation, effected by the amendment above referred to, deprive such corporation of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights. *Ibid.*

The tax as assessed upon the corporation as above described is not a violation of the requirement of c. 1, § 1, art. 4 of the Constitution of the Commonwealth that taxes be "proportional and reasonable." *Ibid.*

Return to Assessors.

Where the return to the assessors of Belmont made by the Massachusetts General Hospital, having a usual place of business in Boston, but owning property in Belmont, was sworn to before a notary public and not before one

Tax (*continued*).

of the assessors of Belmont, it was held, that the return was properly sworn to under St. 1909, c. 490, Part I, § 43, as it could not be said that the petitioner was not a person absent from Belmont. *Massachusetts General Hospital v. Belmont*, 190.

Assessment for Betterments.

Acting under the revised charter of the city of Medford contained in St. 1903, c. 345, as amended by Spec. St. 1915, c. 160, the board of aldermen of Medford passed an order assessing betterments for the laying out of a street in that city, which was not approved by the mayor, and it was held that the order of assessment, being subject to the mayor's veto but not having his approval within the required time, was invalid because it was not passed within two years after the order of layout. *Jewett v. Mayor of Medford*, 85.

Under St. 1917, c. 344, Part III, § 1, a betterment tax for a benefit received from the laying out of a public street in a city must be assessed within two years after the passage of the order of layout, and in the city of Medford this period of limitation runs from the time when the order of layout was approved by the mayor. *Ibid*.

Where on a petition by the owner of land in a city for a writ of certiorari to quash an assessment for betterments for the widening of one street and the laying out of a new street, it appeared that the petitioner's land abutted on the widened part of the pre-existing street and did not abut on the new street, it was held that an order of the city council, correctly construed, amounted to an "alteration" of the pre-existing street as that word is used in R. L. c. 48, § 1, and in R. L. c. 50, § 1, as amended, relating to betterments, and that the order and the work done under it, including the widening of the pre-existing street and the laying out of the new street, constituted a single improvement and authorized the board of aldermen to assess betterments on the lands specifically benefited based upon the entire cost of the improvement as a whole. *Quinn v. Mayor & Aldermen of Springfield*, 595.

Corporation.

The Boston and Albany Railroad Company, which leased its entire property to the New York Central and Hudson River Railroad Company with the approval of the Commonwealth as given by St. 1900, c. 468, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and is not subject to the tax imposed by that statute. *Attorney General v. Boston & Albany Railroad*, 460.

Facts upon which the Ware River Railroad Company was held not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly not subject to the tax imposed by that statute. *Attorney General v. Ware River Railroad*, 466.

Fair Cash Value.

The "fair cash value" of land for the purposes of taxation is ascertained by a consideration of all those elements which make it attractive for valuable use to one under no compulsion to purchase but yet willing to buy for a fair price, attributing to each element of value the amount which it adds to the

price likely to be offered by such a buyer. *Massachusetts General Hospital v. Belmont*, 190.

At a hearing of a petition under St. 1909, c. 490, Part I, § 77, appealing from a refusal of the assessors of the town of Belmont to abate a tax assessed under the provisions of the amendment contained in St. 1914, c. 518, § 1, where the petitioner requested many rulings which correctly stated various principles to be observed in ascertaining the fair cash value of the property for the purposes of taxation, and the judge granted the requests with the qualification that the meaning of the phrase "fair cash value," could not be expressed in a single sentence, it was held that no error was shown. *Ibid.*

Where at the same hearing the judge refused a ruling that "The 'fair cash value' of the real estate in question consists of the value of the property in the market apart from its special adaptability for hospital purposes, plus such sum as a purchaser might add to that value because of the chance that the property might at some time be sought for use as a hospital," it was held that the refusal of the ruling could not be pronounced erroneous. *Ibid.*

In the same case it likewise was held not to have been erroneous for the judge to have refused to rule, "The 'fair cash value' of the real estate in question is no greater than it would be if such real estate were owned by a person to whom the buildings and improvements were of no use." *Ibid.*

In the same case it also was held not to have been erroneous for the judge to refuse to rule "The 'fair cash value' of the real estate in question is the value which the petitioner could have obtained for it at the date as of which the assessment is made, if it had then desired to sell said real estate, after fair and reasonable efforts had been made to find a purchaser who would give the highest price for it." *Ibid.*

Where the judge, at the hearing above described, being asked to give as a ruling, "The 'fair cash value' of the real estate in question is the value which it would have had on April 1 [of the year in question] in the hands of any owner," gave the ruling with a modification which added the words, "including the present owner," it was held that the modification of the ruling was not erroneous. *Ibid.*

Where at the hearing above described, the petitioner excepted to the refusal of the judge to make certain rulings fixing the correct rule for computing the "fair cash value" of the estate for the purposes of taxation it was held, that the exception must be sustained and the case remanded to the Superior Court for further hearing, on the issue as to the fair cash value of the property in question. *Ibid.*

Returns made by the petitioner under St. 1909, c. 490, Part I, § 41, showing a valuation upon its real estate, introduced in evidence at the hearing above described, were held not to have been inadmissible. *Ibid.*

Where the return to the assessors of Belmont made by the Massachusetts General Hospital, having a usual place of business in Boston, but owning property in Belmont, was sworn to before a notary public and not before one of the assessors of Belmont, it was held, that the return was properly sworn to under St. 1909, c. 490, Part I, § 43, as it could not be said that the petitioner was not a person absent from Belmont. *Ibid.*

Exemption.

Under what circumstances the personal property and real estate of a charitable corporation used "for the treatment of mental or nervous diseases" within the meaning of those words as used in St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, is subject to taxation. *New England Sanitarium v. Stoneham*, 171.

Construction of St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, which provides that there should not be included among the charitable institutions exempted from taxation corporations whose property is used for an insane asylum, insane hospital or for the treatment of mental or nervous diseases unless certain conditions as to indigent patients are complied with, pointing out that the word "therefor" therein used, refers to the words "treatment, board, lodging or other direct benefit." *Massachusetts General Hospital v. Belmont*, 190.

Construction of that provision of the amendment above described, which requires that, in order that the institutions referred to therein should be exempted from taxation, one fourth of the property occupied wholly or partly for the designated use, on the basis of valuation, and one fourth of the income from property held for its benefit must be devoted without charge to the direct benefit of indigent insane persons or of indigent persons in need of treatment for mental diseases. *Ibid.*

General law declaratory of a scheme of public policy as to exemption from taxation may be changed by the General Court provided no constitutional guaranty is violated. *Ibid.*

The statute above described as amended is not an unworkable piece of legislation. *Ibid.*

St. 1909, c. 490, Part I, § 5, cl. 3, as amended by St. 1914, c. 518, § 1, denying exemption from taxation to certain charitable corporations, does not deny to the Massachusetts General Hospital, owning property in the town of Belmont which is called the McLean Hospital and which is taxable under the provisions of the statute, the equal protection of the laws guaranteed both by the State and the Federal Constitutions. *Ibid.*

The statutory classification above described, which selects from the charitable institutions and societies that before were entitled to be exempt from taxation certain institutions "for the insane or for the treatment of mental or nervous diseases," and deprives them of the exemptions, on its face is not irrational. *Ibid.*

The mere fact that only two institutions in the Commonwealth are included within the classifications described in the statute above referred to, although it is a factor not to be lightly disregarded, is not conclusive against the validity of the statute, where it appears that the classification is rational. *Ibid.*

The classification of charitable corporations for purposes of exemption from taxation, by the statute above referred to is in accord with a custom in the classification of charities for the purpose of exemption from taxation which long has obtained in this Commonwealth. *Ibid.*

The removal of the exemption from taxation, effected by the amendment above described, does not deprive such corporation of its "property, immunities, or privileges" contrary to art. 12 of the Declaration of Rights. *Ibid.*

It here was said that in a broad sense the words "indigent persons," as used in the amendment above described, include those insane persons and persons in need of treatment for mental diseases who by reason of poverty are unable, having due regard to other imperative obligations resting upon them, to contribute any substantial amount to their support at the institution. *Massachusetts General Hospital v. Belmont*, 190.

On Legacies and Successions.

The tax imposed by U. S. St. 1916, c. 463, § 201 (39 U. S. Sts. at Large, 777), as amended by U. S. St. 1917, c. 159, § 300 (39 U. S. Sts. at Large, 1002), and U. S. St. 1917, c. 63, § 900 (40 U. S. Sts. at Large, 324), is an estate tax and not a legacy or succession tax, and, where the will of a testator makes no provision in regard to its payment, it must be paid out of the residue of his estate. *Phunkett v. Old Colony Trust Co.* 471.

On Income.

In St. 1917, c. 209, § 1, the words, "total local tax levy," mean the levy for all purposes, and not the levy for municipal purposes only. *Cambridge School Committee v. Mayor & City Council of Cambridge*, 6.

The Boston and Albany Railroad Company, which leased its entire property to the New York Central and Hudson River Railroad Company with the approval of the Commonwealth as given by St. 1900, c. 468, is not a corporation "doing business for profit" under St. 1918, c. 255, § 1, and is not subject to the tax imposed by that statute. *Attorney General v. Boston & Albany Railroad*, 460.

Facts upon which the Ware River Railroad Company was held not to be a corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly is not subject to the tax imposed by that statute. *Attorney General v. Ware River Railroad*, 466.

Federal Estate Tax.

The tax imposed by U. S. St. 1916, c. 463, § 201 (39 U. S. Sts. at Large, 777), as amended by U. S. St. 1917, c. 159, § 300 (39 U. S. Sts. at Large, 1002), and U. S. St. 1917, c. 63, § 900 (40 U. S. Sts. at Large, 324), is an estate tax and not a legacy or succession tax, and, where the will of a testator makes no provision in regard to its payment, it must be paid out of the residue of his estate. *Phunkett v. Old Colony Trust Co.* 471.

TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

THEATRE.

At the trial of an action for the breach of contract by a corporation, which was a distributor of moving picture films, to furnish to the plaintiff and to license him to exhibit at his theatre a certain number of films, it was held that the evidence introduced by the plaintiff as to his receipts before

Theatre (*continued*).

and during the period which the contract was to have covered and as to the patronage enjoyed by a competitor of the plaintiff in the same neighborhood who was exhibiting the defendants' films, was competent to give the jury a satisfactory basis on which to find substantial damages. *Orbach v. Paramount Pictures Corp.* 281.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

A motor vehicle of a foreign corporation, having a place of business in this Commonwealth, while being operated upon a public way in this Commonwealth without having been registered here, is an outlaw. *Gondek v. Cudahy Packing Co.* 105.

TRUST.

What constitutes.

Action against the owner of a building for damages resulting from an alleged unlawful eviction of the plaintiff could not be maintained because the plaintiff's claim to a right of possession was founded upon an alleged sublease which the sublessor executed "as trustee, but not individually," whereas the original lease was to him as an individual and he never had assigned it to himself as trustee. *Podren v. Macquarrie*, 127.

An imperfect gift cannot be interpreted to be a declaration of trust. *Cardoza v. Leveroni*, 310.

Although no particular form of words is necessary to create by declaration a trust in a note secured by a mortgage of real estate, a mere executory purpose to do so is not enough. *Ibid.*

Where the owner of a note secured by a mortgage of the maker's real estate made statements to the mortgagor which plainly showed that he considered that the mortgagor had paid enough on the debt, that he considered the mortgage paid and that he intended to make a transfer of the title in the future by discharging it, but died without having done so, such facts are not sufficient to show a complete declaration of a trust of the note for the benefit of the mortgagor. *Ibid.*

Voluntary association which is a partnership and not a trust. *Horgan v. Morgan*, 381.

Construction of Instrument creating Trust.

Where by her will a mother gave a life estate to her son with power of appointment among her "lineal heirs" in the event of his dying leaving no issue, and the son provided by his will that a portion of the fund should be held in trust for the benefit of a niece of the son during her life, but if she should die leaving no issue surviving her then the said portion to go "to the lineal heirs of" the testator's "mother," it was held that the testator

- intended to use the words "lineal heirs" in the same sense that his mother had used them in her will. *Ernst v. Rivers*, 9.
- In the same case it also was held that the words "lineal heirs" meant descendants of the mother who were living at the death of the niece, who were in the same degree of relationship. *Ibid.*
- Where a testator, in the exercise of a power of appointment over a fund given him by his mother's will, provided in his will that a part of the fund should go to one of his nieces for her life, and if she died leaving no issue surviving her, then the fund so left should be conveyed "to the lineal heirs of" the testator's mother, it was held that the fund should be equally divided among nine great-grandchildren of the testator's mother. *Ibid.*
- In the same case it also was held that the trust provision was not void as a violation of the rules against perpetuities. *Ibid.*
- In the above described case it also was held that the great-great-grandchildren of the testator's mother were not entitled to share in the fund. *Ibid.*
- Where a beneficiary under the provisions of a trust is entitled to a certain fractional portion of the income of the trust semiannually, such right is a present, equitable right of ownership which ripens into an ordinary property right when the income accumulated in the hands of the trustee becomes payable, and an assignee of the beneficiary's interest in the trust succeeds to such right and may enforce it in equity. *Woodard v. Snow*, 267.
- Upon the construction of a will, which by the fourth clause placed in trust for the children of a deceased son of the testator "a sum equal to the amount that my said son would have received had he been living at the time of my death," it was held that such sum was not a sum equal to what the son would have received had he survived his father and his father had died intestate, but was determined by the amount which would have come to the son under a fifth or residuary clause of the will. *Lamb v. Jordan*, 335.
- In the same case it was held that the sum thus given by the fifth or residuary clause of the will to the children of the testator's deceased son, being given "subject to the conditions heretofore set forth," was subject to the provisions of trust and survivorship set out in the fourth clause. *Ibid.*
- It was held that, under certain language in a will, a trust was created for the benefit of the husband of the testatrix during his life with a remainder to the children, which might be contingent, but that, whether it was contingent or vested, a certain instrument signed by the children with their father, consenting to the sale by their father of real and personal property in which they agreed to join, and providing that at the death of the father the money should be paid "to his legal representatives," was in conformity in substance to the provisions of the will and did not change the terms of the trust created by it. *Conant v. St. John*, 547.
- In the same case it also was held that a provision in an agreement between the father and the trustee that at his death the fund should be paid over to his legal representatives "freed from all trusts," did not affect the rights of the children, who were not parties to that agreement. *Ibid.*
- In the same case it was ordered that the fund should be distributed among the children to the exclusion of the widow of the father. *Ibid.*

Conversion of Real Estate.

It was held that, under certain language in a will, a trust was created for the benefit of the husband of the testatrix during his life with a remainder to the children, which might be contingent, but that, whether it was contingent or vested, a certain instrument signed by the children with their father, consenting to the sale by their father of real and personal property in which they agreed to join, and providing that at the death of the father the money should be paid "to his legal representatives," was in conformity in substance to the provisions of the will and did not change the terms of the trust created by it. *Conant v. St. John*, 547.

In the same case it appeared that the father and children commingled the proceeds of the real and personal estate in a single fund, but it was said that, even if the fund came from the proceeds of the real estate alone, the inference was inevitable that the trust with which it was impressed was the same to which it ought to have been and would have been made subject had R. L. c. 127, §§ 28, 29, 31, as amended by St. 1917, c. 306, been followed. *Ibid.*

Investments by Trustee.

Where, on an appeal from a decree of the Probate Court approving and allowing an account of a trustee under a will which showed an investment in the preferred shares of the Massachusetts Electric Companies, the single justice reserved certain questions for the determination of the full court, it was held that the reservation required a determination of the question, whether a finding that such investment was proper as a matter of fact must be pronounced wrong as matter of law. *Kimball v. Whitney*, 321.

Definition of a trustee's duty in the making of investments, under a will, which, as to the trust funds, directs him to "keep the same safely and profitably invested in real or personal property, mortgage notes, bonds, stock or any such other conservative investments as in his discretion he may approve." *Ibid.*

In the determination of questions as to the propriety of the investment by the trustee of a portion of the funds of a trust under a will, in the preferred shares of the Massachusetts Electric Companies, a voluntary association created by a declaration of trust, it was held that it was not necessary to determine whether the agreement and declaration of trust constituted a partnership among the shareholders, or a trust. *Ibid.*

In the same case it was held that assuming, without deciding, that a partnership among the shareholders of the Massachusetts Electric Companies was constituted by the agreement and declaration of trust, its character did not as matter of law render the investment unwarranted. *Ibid.*

In the above case it was held that the facts showed that good faith and sound discretion were exercised in making the investment (following *Harvard College v. Amory*, 9 Pick. 446). *Ibid.*

In the same case it was held that the retention of the shares purchased by the trustee from 1903 until 1917 could not be held as a matter of law to have been unwarranted. *Ibid.*

Resulting.

Under the circumstances, it was held that, where three persons were equal owners of certain securities which by agreement among them were exchanged for certain real estate in Montana, the title being taken in the name of two of them at the request of the third, such third party, by a bill in equity, might enforce a resulting trust in a one third undivided interest in the real estate and compel a conveyance to him of such interest. *Magee v. Magee*, 341.

The plaintiff in the suit above described cannot be compelled to pay to the defendants any part of taxes and water rates, which were paid by them and their predecessors in title in relation to the land after a time when the plaintiff made demand for a conveyance of his undivided one third interest. *Ibid.*

Upon facts found by a master in a suit in equity by a street railway corporation, against one who had been the president of the immediate predecessor in title of the plaintiff and a controlling officer of earlier predecessors, to establish a resulting trust in a parcel of land, it was held that a resulting trust was established and that the defendant, or (the defendant having died) his heirs at law, must be ordered to convey the land to the plaintiff. *Boston & Northern Street Railway v. Goodell*, 428.

In a suit in equity by a street railway corporation it was held that the defendant never denied the plaintiff's title before the bringing of the bill and that the statute of limitations could not have begun to run in his favor. *Ibid.*

Termination.

It was held that, under certain language in a will, a trust was created for the benefit of the husband of the testatrix during his life with a remainder to the children, which might be contingent, but that, whether it was contingent or vested, a certain instrument signed by the children with their father, consenting to the sale by their father of real and personal property in which they agreed to join, and providing that at the death of the father the money should be paid "to his legal representatives," was in conformity in substance to the provisions of the will and did not change the terms of the trust created by it. *Conant v. St. John*, 547.

In the same case it was pointed out that the husband and children had no right to terminate the trust as to the personal property nor as to the proceeds of the real estate, which had been made a part of the trust. *Ibid.*

Trusts with Shares represented by Transferable Certificates.

Where, on an appeal from a decree of the Probate Court approving and allowing an account of a trustee under a will which showed an investment in the preferred shares of the Massachusetts Electric Companies, the single justice reserved certain questions for the determination of the full court, it was held that the reservation required a determination of the question, whether a finding that such investment was proper as a matter of fact must be pronounced wrong as matter of law. *Kimball v. Whitney*, 321.

In the determination of questions as to the propriety of such an investment it was held that it was not necessary to determine whether the agreement

Trust (*continued*).

and declaration of trust constituted a partnership among the shareholders, or a trust. *Kimball v. Whitney*, 321.

In the same case it was held that assuming, without deciding, that a partnership among the shareholders of the Massachusetts Electric Companies was constituted by the agreement and declaration of trust, its character did not as matter of law render the investment unwarranted. *Ibid*.

Facts regarding such an investment upon which it was held that it could not be said that, at the time of the investment, it was improper and unwarranted as matter of law. *Ibid*.

TRUSTEE PROCESS.

In a case where an express company under contract with a railroad company was to be paid for business done for it on the basis of a certain percentage of the gross revenue received, payments to be made monthly with an annual adjustment, and an article of the contract provided that the agreement was "subject to all existing and future Federal and State laws," it was held that, in the determination of the amount for which the express company should be charged, as trustee of the railroad company in an action begun by trustee process in which the railroad was defendant, it was entitled to be credited with the amount due to it from the defendant under a ruling of the State court of Oklahoma, adjudging that rates of the railroad had been too large and must be in part refunded. *Reynolds v. Missouri, Kansas & Texas Railway*, 32.

Where a corporation as trustee in an action of contract against a non-resident defendant upon whom no service was made, had filed an answer of "no funds," and later, its answers to interrogatories propounded by the plaintiff, disclosed that, before the service of the writ upon it, goods of the defendant were transferred by it upon the defendant's order to a certain bank, and the bank later was admitted as a party claimant, and on the same day when it was so admitted filed a motion that the trustee be discharged, which was allowed, it was held that the claimant rightly was permitted to move that the trustee be discharged and that the motion properly was allowed. *Eastern Fur & Skin Co. v. Sternfeld*, 210.

It appeared that the answers of the alleged trustee, above described, were based somewhat upon hearsay and upon information and belief. The plaintiff did not seek to introduce further evidence and it was held that, answers to interrogatories, upon information and belief, did not bind the plaintiff nor preclude him from showing their falsity, such answers were entitled to consideration and that, in the absence of any evidence to contradict them, the trustee properly was discharged. *Ibid*.

UNDUE INFLUENCE.

At the trial of an issue as to whether an entire instrument, alleged to be a will, was procured to be executed by fraud or undue influence, evidence as to relations of the decedent and a woman, one of the beneficiaries under the will, about twenty-five years before the death of the decedent, offered before the woman had testified, is not admissible to affect her credibility,

nor as an admission affecting the validity of the will. *Old Colony Trust Co. v. Di Cola*, 119.

At the trial of the issues above described, instructions of the judge to the jury, in substance, that they might take into consideration the fact, if they found it to be a fact, that the will was unreasonable and unnatural, but that the law does not say that one may not make a will which appears to a jury to be unjust and unreasonable, if only he is of sound mind, follows the formalities and is not controlled by undue influence, were held to have been proper. *Ibid*.

USAGE.

See CUSTOM.

VENUE.

Federal Control of Local Action.

Upon a report by a judge of the Superior Court for determination of the correctness of a ruling by him overruling a plea in abatement to an action of contract begun on April 6, 1918, against the New York, New Haven, and Hartford Railroad Company it was said that this court will take judicial notice of the date and of certain provisions of "General Order 18-A," signed by the director general of railroads concerning the venue of certain actions against railroads, although they are not included in the record nor called to the court's attention by the counsel for the parties. *West v. New York, New Haven, & Hartford Railroad*, 162.

It appearing that no attachment of property was made in the action above described, it was held that the bringing of the action in the county where the defendant had a usual place of business violated no federal enactment applicable to the circumstances, and that the plea in abatement properly was overruled. *Ibid*.

VERDICT.

See PRACTICE, CIVIL.

VOLUNTARY ASSOCIATION.

In an action upon certain promissory notes against all the shareholders of a voluntary association under a declaration of trust which, in *Frost v. Thompson*, 219 Mass. 360, was held to be a partnership and not a trust, it was held that the association and the individual shareholders were bound by the acts of the acting treasurer in signing and indorsing the notes in question and that a finding for the plaintiff was warranted. *Horgan v. Morgan*, 381.

VOTING CONTEST.

A "voting contest," conducted by a merchant, whereby purchasers would be entitled to prizes determined by votes procured by purchasing goods of the

defendant, was held not to be a "lottery" nor within the prohibitions of R. L. c. 214, § 7. *Whitman v. Fournier*, 154.

WAIVER.

Although ordinarily objection to the failure of a non-resident plaintiff to furnish an indorser for costs under R. L. c. 173, § 39, is taken to have been waived if such objection was not made at the first term of court after the entry of the writ, yet, where the plaintiff's non-residence was not disclosed on the pleadings and was not known to the defendant, this rule does not apply. *Keown v. Hughes*, 1.

Circumstances under which it was held in an action upon a promissory note, where § 51 of the small loans act, R. L. c. 102, was invoked in defence, there was nothing which would warrant a finding that the defendant had waived his right under the statute by the executing and delivering of the last note, because at the time he did so there was no debt in existence. *Koltin v. Brown*, 16.

In a suit in equity, by one as the surviving executor of the will of his father and also as devisee under that will against his brother, to enjoin the further prosecution by the defendant of an action at law on an agreement in writing executed by the plaintiff's testator about seventeen years before his death, it was held that, by accepting the benefits of the will, the defendant had elected to ratify the will and thereby had lost his right to enforce the provisions of the earlier contract which would prevent its operation, and that the plaintiff was entitled to an injunction restraining the defendant from further prosecuting his action at law. *Noyes v. Noyes*, 55.

In the case above stated, it was said that it was not necessary to determine what might have been the effect of these matters if the present suit had been brought by the plaintiff merely as executor. *Ibid*.

In an action against the surety on a poor debtor's recognizance it was said that it was unnecessary to determine whether the creditor's counsel by his appearances at the hearings and other acts, without raising any objection to the regularity of the proceedings, had waived the right to object to any failure of the debtor properly to surrender himself for examination or to any want of jurisdiction in the court over the person of the debtor, because as matter of law the evidence did not warrant a finding that there had been any breach of the recognizance. *McKeon v. Briggs*, 99.

Certain remarks of counsel, occurring after the denial of a motion by him in his client's behalf and the refusal of certain requests by him for rulings, were held not to have constituted a waiver of the requests. *Gondek v. Cudahy Packing Co.* 105.

In an action of contract for commissions claimed by the plaintiff it was held that whether the defendant had waived his right to terminate the contract depended upon what was the intent of the parties and was a question of fact for the jury, who were warranted in finding that there had been such a waiver. *Emerson v. Ackerman*, 249.

In an action at common law for personal injuries sustained while in the employ of the defendant, where it appeared that the plaintiff entered the defendant's employ before July 1, 1912, when the defendant became a subscriber under the workmen's compensation act and posted printed notices in form and

substance as required by St. 1911, c. 751, Part IV, §§ 20, 21, it was held that the plaintiff by failing to give the notice required by Part I, § 5, had waived her right of action at common law, although she had no knowledge of the fact that the defendant was a subscriber. *Gilbert v. Wire Goods Co.* 570.

Where the plaintiffs in their brief in a suit in equity to review an order of the public service commission in regard to a consolidation of railroad companies and the reorganization of a railroad system declined to discuss the validity of an "alleged debt" of \$13,306,000, which was to be paid under the plan of reorganization, further than to restate their previous contentions, and the record discloses evidence sufficient to determine the validity of this indebtedness, it was held that this equivocal position of the plaintiffs was not to be treated as an admission or a waiver, and the court proceeded to decide the question. *Brown v. Boston & Maine Railroad*, 502.

WARE RIVER RAILROAD COMPANY.

Facts upon which the Ware River Railroad Company was held not to be a corporation "doing business for profit" under St. 1918, c. 255, § 1, and accordingly not subject to the tax imposed by that statute. *Attorney General v. Ware River Railroad*, 466.

WAY.

Private.

Language employed in conveyances of parcels of land, which was held to have warranted a decree by the Land Court registering in the petitioner the unincumbered title to that part of a way, indicated on the plan, which lay between the land on both sides of it owned by him. *Stevens v. Young*, 304.

Language employed in conveyances of parcels of land, portions of a tract laid out in house lots and streets, according to a plan previously recorded, and to which reference was made, which was held to warrant a further finding, that the original owner by a certain deed executed by him to the respondent's predecessor in title, intended to convey the fee in one of the ways and in part of the second of the ways, included in a solid tract described, but without giving to the grantee any easement in the remainder of the second way. *Ibid.*

Public.

A motor vehicle of a foreign corporation, having a place of business in this Commonwealth, while being operated upon a public way in this Commonwealth without having been registered here, is an outlaw. *Gondek v. Cudahy Packing Co.* 105.

Conditions of a certain offer in writing by owners of land to a city to accept in full of damages for their land and buildings taken or injuriously affected by the proposed widening and laying out of certain streets the amounts set opposite their respective names, were held, when accepted by the acts of the city, to have been valid; and it also was held that, the sums named being "in full of damages," no interest should be allowed. *King v. Springfield*, 592.

Way (continued).

Where on a petition by the owner of land in a city for a writ of certiorari to quash an assessment for betterments for the widening of one street and the laying out of a new street, it appeared that the petitioner's land abutted on the widened part of the pre-existing street and did not abut on the new street, it was held that an order of the city council, correctly construed, amounted to an "alteration" of the pre-existing street as that word is used in R. L. c. 48, § 1, and in R. L. c. 50, § 1, as amended, relating to betterments, and that the order and the work done under it, including the widening of the pre-existing street and the laying out of the new street, constituted a single improvement and authorized the board of aldermen to assess betterments on the lands specifically benefited based upon the entire cost of the improvement as a whole. *Quinn v. Mayor & Aldermen of Springfield*, 595.

Negligence in use of way, see that subtitle under NEGLIGENCE.

WILL.

Antenuptial Agreement.

Where in an antenuptial agreement a man agrees to provide by his will so that his intended wife shall have a certain portion of his estate and she agrees to accept that portion in full of dower and of other rights there is an implied term of the agreement that, if the man fully performs the agreement, the woman will not contest the proof of a will made by the man in performance of the agreement. *Eaton v. Eaton*, 351.

A suit in equity may be maintained to enjoin the widow of a testator from contesting the proof of his will, if by so doing she violates the provisions of an antenuptial agreement between herself and the testator which was fully performed by him. *Ibid.*

One named as executor of a will made in performance of such an antenuptial agreement, in case the widow undertakes to contest the proof of the will, has sufficient interest to maintain a suit in equity to enjoin such contest although he has not yet been appointed executor. *Ibid.*

Attestation.

Facts upon which it was held that a witness to a will was not disqualified by reason of interest. *Renwick v. Macomber*, 530.

Validity.

Only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases, are competent, in this Commonwealth, to give their opinion as to the testator's mental condition. *Old Colony Trust Co. v. Di Cola*, 119.

At the trial of an issue as to whether an entire instrument, alleged to be a will, was procured to be executed by fraud or undue influence, evidence as to relations of the decedent and a woman, one of the beneficiaries under the will, about twenty-five years before the death of the decedent, offered before the woman had testified, is not admissible to affect her credibility, nor as an admission affecting the validity of the will. *Ibid.*

Upon the facts which appeared at the trial of an issue as to whether a testator, who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion, as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental disease. *Old Colony Trust Co. v. Di Cola*, 119.

At the trial of the issues above described, instructions of the judge to the jury, in substance that they might take into consideration the fact, if they found it a fact, that the will was unreasonable and unnatural, but that the law does not say that one may not make a will which appears to a jury to be unjust and unreasonable, if only he is of sound mind, follows the formalities and is not controlled by undue influence, were held to have been proper. *Ibid*.

A widow cannot maintain a suit in equity to restrain an heir at law of her husband from contesting the validity of the husband's alleged will on the ground of the subsequent marriage, because under R. L. c. 74, § 1, cl. 3, and 6 no suit can be based on an agreement in consideration of marriage without a memorandum in writing, and an agreement to make a will also must be in writing. *Sughrue v. Barlow*, 468.

Revocation by Marriage.

An alleged will in favor of the person who after its execution became the wife and widow of the alleged testator, and who was induced to marry him by his oral promise to make a will in her favor, is revoked under R. L. c. 135, § 9, by such subsequent marriage, if it does not appear from the alleged will that it was made in contemplation of such marriage. *Sughrue v. Barlow*, 468.

Construction.

See DEVISE AND LEGACY.

WITNESS.

Attorney as Witness.

An attorney who drew a will and was present when it was executed, but who was not a subscribing witness, may be permitted to state that he did not hear the testator say or do anything which indicated that he was not of sound mind. *Old Colony Trust Co. v. Di Cola*, 119.

Expert.

Only the witnesses to a will, the testator's family physician and experts of skill and experience in the knowledge and treatment of mental diseases are competent, in this Commonwealth, to give their opinion as to the testator's mental condition. *Old Colony Trust Co. v. Di Cola*, 119.

The mere fact that a witness is a surgeon or a physician does not of itself qualify him as an expert in mental diseases. *Ibid*.

Upon the facts which appeared at the trial of an issue as to whether a testator,

Witness (*continued*).

who had died from the results of having been shot and who within twelve hours after the shooting had made his will while on his deathbed, was of sound mind, it was held that it could not be said that there was reversible error in the exclusion of the opinion as to the testator's soundness of mind, of a surgeon who had never attempted to treat any kind of mental diseases. *Old Colony Trust Co. v. Di Cola*, 119.

Where, at a hearing before a master, in a probate appeal where the validity of a marriage in the State of Rhode Island was in issue, certain sections of a statute of Rhode Island were put in evidence which never had been construed by the courts of that State, and the opinion of a member of the bar of Rhode Island, who testified as an expert as to the correct construction of the statute, was the only evidence on the subject except the statute itself, it was held that the master had the right to disregard the testimony of the expert and to form his own opinion as to the legal effect of the statute. *Martin v. Otis*, 491.

Party called by Adversary.

In an action against a landlord for causing conscious suffering and death of his tenant's wife, the defendant was called as a witness by the plaintiff, and upon examination was required to answer questions as to repairs made on the premises and as to whether he had authorized them, and it was held that there was no error in permitting such examination. *Bergeron v. Forest*, 392.

Subscribing Witness to Will.

Fact upon which it was held that a witness to a will was not disqualified by reason of interest. *Renwick v. Macomber*, 530.

WORDS.

"Aggrieved." See *Crowell v. Davis*, 136, 138, 139.

"Alteration." See *Quinn v. Mayor & Aldermen of Springfield*, 595, 598.

"As profit." See *Ross v. Burrage*, 439, 449.

"Avoid." See *Graves v. Apt*, 587, 589, 590.

"Bail." See *National Surety Co. v. Nazzaro*, 74, 76.

"Bail bond." See *National Surety Co. v. Nazzaro*, 74, 76, 77.

"Business." See *Attorney General v. Boston & Albany Railroad*, 460, 462.

"Doing business for profit." See *Attorney General v. Boston & Albany Railroad*, 460, 461; *Attorney General v. Ware River Railroad*, 466, 467.

"Employee." See *Gilbert v. Wire Goods Co.* 570, 572, 573.

"Fair cash value." See *Massachusetts General Hospital v. Belmont*, 190, 205, 206, 208.

"Forthwith." See *Loonie v. Wilson*, 420, 424.

"Heirs." See *Ernst v. Rivers*, 9, 14, 15.

"Indigent persons." See *Massachusetts General Hospital v. Belmont*, 190, 199.

"Issue." See *Ernst v. Rivers*, 9, 14, 15.

"Legal representatives." See *Conant v. St. John*, 547, 550, 552, 553.

"Lineal heirs." See *Ernst v. Rivers*, 9, 11, 12, 13, 14, 15.

"Lottery." See *Whitman v. Fournier*, 154, 157.

"Maturity." See *Gaston v. Boston Penny Savings Bank*, 23, 27, 28.

- "Memorandum." See *Commonwealth v. O'Neil*, 535, 543.
 "Merchandise." See *Tupper v. Barrett*, 565, 568.
 "Nervous diseases." See *New England Sanitarium v. Stoneham*, 171, 172.
 "Non-resident." See *Gondek v. Cudahy Packing Co.* 105, 110.
 "Probably." See *McGrath v. Wehrle*, 456, 460.
 "Properties." See *Ross v. Burrage*, 439, 441, 449, 450.
 "Recognizance." See *National Surety Co. v. Nazzaro*, 74, 76.
 "Review." See *Murray v. Justices of the Municipal Court of the City of Boston*, 186, 187, 188, 189.
 "Takes over." See *Ross v. Burrage*, 439, 441.
 "Therefor." See *Massachusetts General Hospital v. Belmont*, 190, 199.
 "Total local tax." See *Cambridge School Committee v. Mayor & City Council of Cambridge*, 6, 9.
 "Without proper cause." See *Murray v. Justices of the Municipal Court of the City of Boston*, 186, 187, 188, 189.

WORKMEN'S COMPENSATION ACT.

Employee's Claim of Common Law Rights.

In an action at common law for personal injuries, where it appeared that the plaintiff entered the defendant's employ upon July 1, 1912, when the defendant became a subscriber under the workmen's compensation act and posted printed notices in form and substance as required by St. 1911, c. 751, Part IV, §§ 20, 21, it was held that the plaintiff by failing to give the notice required by Part I, § 5, had waived her right of action at common law, although she had no knowledge of the fact that the defendant was a subscriber. *Gilbert v. Wire Goods Co.* 570.

Jurisdiction and Power of Industrial Accident Board.

A decree of the Superior Court purporting to be made under the workmen's compensation act approving an agreement made in accordance with St. 1911, c. 751, Part III, § 4, as amended, by an insurance company with the dependent widow of an employee, by which the insurer agreed to pay to such widow a weekly compensation during a period named for the death of the employee, which appears by the record to have occurred in the course of his employment on a steamship lying at a wharf upon navigable waters, is void for want of jurisdiction, because the injury to the employee was maritime in its nature and not within the scope of the workmen's compensation act. *Sterling's Case*, 485.

Such decree may be vacated upon a bill of review under general equity jurisdiction for error on the face of the record. *Ibid.*

Procedure.

Depositions.

On an appeal from a decree of the Superior Court, made in proceedings under the workmen's compensation act, the record showed that the claimant, who was the widow of the employee fatally injured, resided in Italy and that, at the hearing by the Industrial Accident Board upon a review of a

decision of a single member at the request of the claimant, a motion of the claimant that she be permitted to take depositions of witnesses in Italy was denied, and it was held that it could not be said that there was any reason to question the action of the single member of the Industrial Accident Board and of the full board in refusing to request the Superior Court, under St. 1911, c. 751, Part III, § 3, as amended by St. 1915, c. 275, to issue a commission for the taking of the deposition. *Perotti's Case*, 297.

Finality of findings by Industrial Accident Board.

In a claim under the workmen's compensation act, a decision of the Industrial Accident Board upon a question of fact is final and cannot be reversed if there was any evidence to support it. Following *Pass's Case*, 232 Mass. 515, and the cases there cited. *Amodio's Case*, 104.

Where at the hearing on a claim under the workmen's compensation act, it was found by a single member of the Industrial Accident Board, that the mother of a boy, sixteen years old, was partially dependent on the boy at the time of his injury and death and the full board confirmed this finding, it was held that the question of dependency was to be determined in accordance with the fact, as the fact might be at the time of the injury, and that the finding of partial dependency could not be presumed erroneous in law. *Freeman's Case*, 287.

Claim of dependent mother under the workmen's compensation act for the injury and death of her son where it was held that the amount of money contributed by the employee to his mother during the twelve months preceding his injury was a question of fact upon which the finding of the Industrial Accident Board was final. *Ibid.*

In a proceeding under the workmen's compensation act where the widow of the employee was found to be a partial dependent, it was held that the decision of the Industrial Accident Board on the question of dependency, being one of fact, was final. *Perotti's Case*, 297.

Decree.

Upon a petition to vacate and a bill in equity to enjoin the enforcement of a decree of the Superior Court purporting to have been made under the workmen's compensation act and ordering compensation for injuries of a maritime nature, it was said that, as the decree must be vacated for error on the face of the record, it was not necessary to determine whether the insurer could maintain a bill in equity to enjoin the enforcement of the void decree. *Sterling's Case*, 486.

The right given by R. L. c. 193, §§ 15-19, to have final judgment in civil actions reviewed and vacated is limited to proceedings in courts of common law and does not apply to a decree of the Superior Court made under the workmen's compensation act. *Ibid.*

Appeal.

Under the workmen's compensation act there is no right of appeal from a decree of the Superior Court based upon a memorandum of agreement approved by the Industrial Accident Board. Following *Dempsey's Case*, 230 Mass. 583. *Sterling's Case*, 485.

Amount of Compensation.

Claim of a dependent mother where it was held that the "annual earnings of the deceased at the time of his injury" should be computed by adding together his actual earnings during that period and not by multiplying his weekly wages at the time of his injury by fifty-two. *Freeman's Case*, 287.

Dependency.

Where at the hearing on a claim under the workmen's compensation act, it was found by a single member of the Industrial Accident Board that the mother of a boy, sixteen years old, was partially dependent on said boy at the time of his injury and death and the full board confirmed this finding, it was held that the question of dependency was to be determined in accordance with the fact, as the fact might be at the time of the injury, and that the finding of partial dependency could not be presumed erroneous in law. *Freeman's Case*, 287.

In the same case it appeared that the mother did not know that the son was working and that his intent was to send her the proceeds of that particular employment as fast as earned, but it was held that this circumstance, in view of all the facts, was not in itself decisive. *Ibid.*

In the same case it was held that evidence was admissible respecting the intent of the son to send to his mother the part of his wages which remained after paying for his board and clothing. *Ibid.*

Evidence of the intent of a son to send to his mother a part of his wages for her support, held to be admissible at a hearing before a single member of the Industrial Accident Board, of a claim by a mother for compensation for the death of her son, brought under the workmen's compensation act, for the purpose of proving her partial dependency, was admissible. *Ibid.*

In a proceeding under the workmen's compensation act where the widow of the employee was found to be a partial dependent, it was held that the decision of the Industrial Accident Board on the question of dependency, being one of fact, was final. *Perotti's Case*, 297.

Minor Employees.

The provision contained in Part II, § 14, of the workmen's compensation act does not deprive a minor of his rights under the act or of the power to exercise them himself. *Gilbert v. Wire Goods Co.* 570.

Under the title and provisions of the workmen's compensation act (St. 1911, c. 751, as amended) and the definition of "Employee" contained in Part V, § 2 of the act, a minor employee is within the provisions of the act and is bound by its terms. *Ibid.*

Maritime Employment.

In an action at common law against the master and owners of a fishing vessel for personal injuries to a member of the crew from an explosion of gasoline while on board the vessel in Boston Harbor, it was assumed, without the question being raised, that, his injury being a maritime tort, the workmen's compensation act has no application to it. *Cambra v. Santos*, 131.

Independent Contractor.

Conditions of the contract of employment of a claimant under the workmen's compensation act against a town, upon which it was held that the claimant was an independent contractor and not an employee of the town and could not be awarded compensation. *Eckert's Case*, 577.

WRONGDOER WITHOUT REMEDY.

Where a corporation, without payment, fraudulently conveyed its assets to a new corporation organized to receive them, it was held that the defendant new corporation, having participated actively in the fraud, could not be allowed for amounts that it had paid to the merchandise creditors of the principal defendant, such payments having been made in pursuance of a dishonest purpose to defraud the other creditors of the principal defendant and to maintain its own credit. *Manufacturers National Bank v. Simon Manuf. Co.* 85.

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